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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 16.

TOMAS C. GUTIERREZ ET AL., APPELLANTS,

vs.

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

(17,602.)

(17,802.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 85.

TOMAS C. GUTIERRES ET AL., APPELLANTS,

vs.

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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1 In the Supreme Court of the United States.

ALBUQUERQUE LAND & IRRIGATION COMPANY, Appellee,
vs.
TOMAS C. GUTIERRES, PEDRO GRIEGO Y APODACA, JESUS Zamora, Benito Jaramillo, and Leon Montoya, Appellants. } No. —.

Be it remembered, that heretofore, on the 7th day of December, A. D. 1899, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, a transcript of record in the above-entitled cause, which said transcript of record was and is in words and figures, as follows, to wit:

2 In the Supreme Court of the Territory of New Mexico.

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY *et al.*, Appellees,
vs.
TOMAS C. GUTIERREZ ET AL., Appellants. } No. —.

Transcript of Record.

Appeal from the district court in and for the county of Santa Fé, first judicial district, on a change of venue from the county of Bernalillo, second judicial district.

In the District Court of the First Judicial District of the Territory of New Mexico within and for the County of Santa Fé.

3 THE ALBUQUERQUE LAND AND IRRIGATION COMPANY *et al.*
vs.
TOMAS C. GUTIERREZ ET AL. } No. 3956. Civil.

Be it remembered that heretofore, to wit, on the 25th day of May, A. D. 1898, there was filed in the office of the clerk of the district court of the first judicial district of the Territory of New Mexico, within and for the county of Santa Fé, a transcript of record entries from the district court of second judicial district of said Territory of New Mexico, in and for the county of Bernalillo, which said transcript is in words and figures following, to wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo, Second Judicial District, } *ss:*

Be it remembered that on the 17th day of January, A. D. 1898, there was filed and entered of record in the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, an order, which said order is in words and figures as follows, to wit:

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY
vs. } 4956.
TOMAS C. GUTIERREZ ET AL.

Upon reading the foregoing complaint, it is ordered that a temporary restraining order issue as prayed for, upon the plaintiff filing bond and sureties to be approved by the clerk of this court,
4 in the sum of five hundred dollars, conditioned to pay all damages that may result or arise by reason of said injunction being granted, and that defendants show cause on the 25th day of January, 1898, if any they have, why said injunction should not be continued.

It is further ordered that a copy of this order be served upon these defendants at least five days before the said twenty-fifth day of January, 1898, when they are required to show cause.

Done this 17th day of January, 1898.

J. W. CRUMPACKER, *Judge, etc.*

And be it further remembered that afterwards, to wit, on the 25th day of January, A. D. 1898, in the said district court, the following proceedings were had and entered of record.

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY
vs.
TOMAS GUTIERREZ ET AL.

On motion of plaintiff, the hearing of this cause is this day continued until January 27th, at ten o'clock in the forenoon.

And it is further ordered that the injunction heretofore granted herein be and the same is hereby continued until the further order of the court in the premises.

J. W. CRUMPACKER, *Judge, etc.*

And be it further remembered that afterwards, to wit, on the 26th day of January, A. D. 1898, in the said district court, the following proceedings, were had and entered of record:

5 THE ALBUQUERQUE LAND AND IRRIGATION COMPANY
vs.
TOMAS C. GUTIERREZ ET AL.

Upon the suggestion of the illness of E. W. Dobson, counsel for plaintiff herein, by consent of the parties the hearing herein set for January 27th, is postponed until the 28th day of January, 1898, at ten o'clock in the forenoon.

And it is further ordered that the injunction heretofore granted in this cause be continued until said twenty-eighth day of January, 1898.

J. W. CRUMPACKER, *Judge, etc.*

And be it remembered that afterwards, to wit, on the 8th day of February, A. D. 1898, there was filed and entered of record in the

said district court for the county of Bernalillo, an order, which said order is in words and figures following, to wit:

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY
vs.
TOMAS C. GUTIERREZ ET AL.

This cause having heretofore been heard upon the complaint of the plaintiff herein and the answer of the defendants and demurrer of said plaintiff to the new matter contained in the said answer of the said defendant-, and the same having been taken under advisement by the court and the court being now sufficiently advised, it is.

Ordered, adjudged and decreed that the injunction heretofore granted, restraining the said defendants and each of them from obstructing and delaying the plaintiff, The Albuquerque Land
6 and Irrigation Company, its agents, servants and employés, from proceeding with the examination and survey, by obstructing, preventing and hindering their entrance upon and along lands lying and being at, near and along the proposed route for the canal, ditch and pipe line beginning at a point on the east bank of the Rio Grande, south or near the Indian pueblo of San Felipe, in the county of Bernalillo and Territory of New Mexico, and the terminus of said line to be at a point south near the railway bridge of the Atchison, Topeka and Santa Fe railway, at Isleta, also in said county of Bernalillo, the general course and direction of said main line being southerly, east of the east bank of the said river, along and under the foot-hills, through the city of Albuquerque, and the length thereof estimated to be thirty-five miles, more or less, or otherwise be, and the same hereby is continued until the further orders of this court.

And it is further ordered that the injunction prayed for by the defendants in their cross-complaint in this cause be and the same is hereby denied; the court reserving to itself for future determination the entering of an order upon the demurrer to the new matter in said answer, and the demurrer to the said cross-complaint: this order not to be construed as passing upon the said demurrers, or either of them, in any respect whatever.

J. W. CRUMPACKER, *Judge, etc.*

And be it further remembered that at a regular term of the district court of the second judicial district of the Territory of New Mexico, begun and held within and for the county of Berna-
7 lillo, at the court-house in the city of Albuquerque, in said county, on the first Monday of March, 1898, and on the 6th day of said term, the same being the twelfth day of March, 1898, the following among other proceedings were had and entered of record, to wit:

Present: The Hon. J. W. Crumpacker, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district thereof, presiding.

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY
vs.
TOMAS C. GUTIERREZ ET AL. } 4956.

The above cause coming on to be heard upon the demurrer to the answer and to the cross-complaint therein, and the court having taken the same under advisement, and being now fully advised, doth order and adjudge that the said demurrer be and the same is hereby overruled, and that the plaintiff and cross-defendant do forthwith reply to the new matter in said answer and answer the said cross-complaint; to which order and judgment overruling the said demurrer the said plaintiff and cross-defendant excepts.

And be it further remembered, that afterwards, to wit, on the eighteenth day of May, A. D. 1898, in said district court the following proceedings were had and entered of record:

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY
vs.
TOMAS C. GUTIERREZ ET AL.

8 This cause is this day heard upon defendants' motion and affidavits in support thereof, for a change of venue therein, as well as upon plaintiff's objections thereto and counter-affidavits filed herein, and the court having heard the arguments of counsel, Neill B. Field, Esq., representing the defendants and N. C. Collier, Esq., and E. W. Dobson, Esq., representing the plaintiff, and now being fully advised in the premises;

It is considered and ordered by the court that the venue in this cause be and the same hereby is changed from this county to the county of Santa Fé, in the first judicial district, Territory of New Mexico, and the clerk of this court is directed to transmit the papers together with a transcript of the record in said cause within ten days to the clerk of said district court of the first judicial district within and for the county of Santa Fé, in the Territory of New Mexico.

J. W. CRUMPACKER, *Judge.*

TERRITORY OF NEW MEXICO,
Second Judicial District, County of Bernalillo, } *ss:*

I, Harry P. Owen, clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, do hereby certify that the above and foregoing is a full, true and complete copy and transcript of the proceedings had and entered of record in the said district court for the county of Bernalillo, in the cause of The Albuquerque Land and Irrigation Company against Tomas C. Gutierrez, *et al.*, No. 4956, as the
9 same remains of record in my said office. And I further certify that all the papers filed in my said office are set forth in said transcript.

Witness my hand and the seal of said district court at my office in Albuquerque, New Mexico, this 18th day of May, 1898.

[SEAL.] HARRY P. OWEN,
Clerk of said District Court.

Costs in Bernalillo County.

	Clerk.	Sheriff.
Paid by pl't'ff.....	$8 60	$7 00
Paid by def'ts.....	2 45	P'd by pl't'ff
	$11 05	

And afterwards, to wit, on the day and year last aforesaid, there was also filed in the district court of the first judicial district of the Territory of New Mexico, within and for the county of Santa Fé, accompanying said transcript of record hereinbefore set out, from the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, complainant's bill of complaint, which said bill of complaint is in words and figures following, that is to say:

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting within and for the County of Bernalillo.

THE ALBUQUERQUE LAND AND IRRIGATION CO., Plaintiff,
vs.
TOMAS C. GUTIERREZ, PEDRO GRIEGO Y APODACA, JESUS Samora, Benito Jaramillo, Leon Montoya, Defendants.

10 1. The Albuquerque Land and Irrigation Company, a corporation organized under the laws of the Territory of New Mexico and having its principal place of business at Albuquerque, in the county of Bernalillo in said Territory, complains of the above-named defendants, all residents of the county of Bernalillo, and such other persons whose names it may hereafter desire to add as parties to this suit, in an action for relief and injunction.

2. Plaintiff shows that it is a corporation organized under an act of General Assembly of the Territory of New Mexico, entitled "An act to authorize the formation of companies for the purpose of constructing irrigating and other canals, and colonization and improvement of lands," approved February 24th, 1887; the date of its articles of incorporation being the 31st day of December, 1897, a copy of which said articles are hereto annexed, marked Exhibit "A," referred to and made a part of this complaint.

3. Plaintiff further shows that under said act it is provided that if any corporation formed thereunder shall not commence the transaction of its business within one year from the time of the filing of its articles of -corporation, its corporate powers shall cease.

4. Plaintiff further shows that, as stated in its said articles of incorporation, it has been organized for the purpose of constructing

and maintaining reservoirs, canals, ditches and pipe lines, for the supplying of water for irrigation and colonization and improvement of lands in connection therewith; being so organized and incorporated, it is given the right to cause such examinations and
11 surveys of lands for its proposed reservoirs, canals, pipe lines and ditches, as may be necessary to the selection of the most eligible locations and advantageous routes, and for such purpose, by its officers, agents and servants, to enter upon the lands and water of any person or of this Territory along the route of its proposed canal, pipe lines and ditches.

5. Plaintiff further shows that it has the right to hold and own real estate and other property acquired either by purchase, gift or by condemnation where the same cannot be acquired by agreement with the owners thereof, in furtherance of the purpose of its organization; and do all other things necessary and proper in the prosecution of its business and towards the building and construction of reservoirs, canals, ditches, pipe lines.

6. Plaintiff further shows that the proposed route of its canal, ditch and pipe line is as set forth in its articles of incorporation, as follows, to wit: The beginning point of the main line of said canals, ditches, pipe lines and feeders for said reservoirs shall be at a point on the east bank of the Rio Grande south of and near the Indian pueblo of San Felipe, in the county of Bernalillo and Territory of New Mexico, and terminus of said main line shall be at a point to the south near the railway bridge of the Atchison, Topeka and Santa Fe railway, at Isleta, also in said county of Bernalillo. The general course and direction of said main line shall be southerly, east of the east bank of said river along and under the foot-hills through the city of Albuquerque, and the length thereof shall be thirty-five miles, more or less.

12 7. Plaintiff further shows that after having become organized as aforesaid, its board of directors employed a civil engineer and other officers, agents and servants to begin on the preliminary survey for the purpose of determining, fixing and locating the exact line and most advantageous route for its proposed canal, ditch and pipe line, and which said canal, ditch and pipe line it in good faith proposes to construct and maintain; and said civil engineer with said other servants, in pursuance of such employment and proceeding upon the line as designated in said articles of incorporation, began at the said city of Albuquerque, and going northerly upon various and sundry strips of land, made examination and survey for the purpose of ascertaining, determining and selecting eligible locations and an advantageous route for said proposed canal, ditch and pipe line; and in so doing had proceeded northerly to the extent and distance of about three and a half miles, when the said civil engineer and said other servants of plaintiff were by the said defendants and other persons to this plaintiff unknown, forcibly resisted, impeded, hindered, prevented and stopped from entering upon and making survey of land to the north of the point they had reached, and that it became and was impossible for said civil engineer and said other servants to further proceed with the making of such examina-

tion and survey because and by reason of the forcible resistance then and there made and interposed by said defendants and such other persons to this plaintiff unknown.

8. Plaintiff further shows that the said civil engineer and
13 its other servants and agents, having been prevented as aforesaid from proceeding with such examination and survey, did afterwards, to wit, on Monday, the 17th day of January, 1898, proceed again to said point where such forcible resistance and prevention had been made as aforesaid, and did again attempt to proceed with said examination and survey; and the said defendants and other persons to this plaintiff unknown did, by acts of force and intimidation, prevent and resist the entering upon the land lying immediately north of the point said surveyors had reached, and did then and there state, say and give out that they, the said defendants would, as often as said examination and survey should be attempted to be proceeded with, interpose and forcibly prevent the same; said defendants and other persons stating that they would resist, oppose and obstruct the making of any and all surveys and examinations attempted to be made by the plaintiff, its agents and servants for the purpose of locating, determining and fixing any route for its proposed canal, ditches and pipe lines; they, the said defendants and other unknown persons, then and there well knowing that the purpose and object of said civil engineer and said other servants was to locate and select eligible locations and an advantageous route for the plaintiff in the prosecution of its work of building said canal, ditch and pipe line.

9. Plaintiff further shows that it is informed and believes that the defendants and said other unknown persons, pretend to claim and own some right, title or interest in the land, entrance upon which they offered and threatened to continue to offer forcible re-
14 sistance, and that they claim and pretend that being the owners of said right, title and interest, this plaintiff by its agent and servants, has no lawful right to enter thereon for the purpose of making such examination and survey and not that said land will be injured or damaged in any way, manner or form by said entrance for the purpose aforesaid and not that the said plaintiff could not and would not respond to any damage that might ensue from such entrance for said purpose.

10. Plaintiff further shows that the said forcible resistance, if continued, will result in irreparable injury to the plaintiff, and will delay, prevent and hinder the carrying out of the object of the plaintiff as a corporation and interfere with, prevent and obstruct it in the selection of suitable locations and routes for its proposed canal, ditch and pipe line.

Wherefore plaintiff prays that the said defendant and such other persons whose names are unknown and when ascertained, their names to be added as parties defendant to this complaint, may be perpetually enjoined from hindering, preventing and obstructing plaintiff and its servants and agents from entering upon all or any lands whether said land be claimed or any right, title or interest therein be claimed by said defendants or any of said person or per-

sons at, near and along the line beginning at a point on the east bank of the Rio Grande south of and near the Indian pueblo of San Felipe in the county of Bernalillo and Territory of New Mexico and the terminus of said line to be at a point to the south near the
15 railway bridge of the Atchison, Topeka and Santa Fe railway at Isleta in said county of Bernalillo; the general course and direction of said line to be southerly, east of the east bank of the said river along and under the foot-hills through the city of Albuquerque, and the length thereof to be thirty-five miles, more or less, for the purpose of making examinations and surveys to the end of selecting eligible locations for the proposed reservoirs and an advantageous route for the proposed canal and ditch to the plaintiff, and that in the meantime a temporary restraining order issue out of this court enjoining and preventing each and every of said defendants and said other unknown persons from hindering, preventing, obstructing or delaying said plaintiff and its agents and servants from proceeding with the prosecuting and continuing said examination and survey by entering upon all lands along and near said proposed route; and that plaintiff have such other and further relief in the premises as to your honor shall seem meet and equity and justice shall require.

THE ALBUQUERQUE LAND AND IMPROVEMENT CO.,
By C. K. NEWHALL, *Sec'y.*

COLLIER & MARRON AND
CHILDERS & DOBSON,
Attorneys for Plaintiff.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

P. E. Harroun being duly sworn, deposes and says that he is the agent and employé of the plaintiff in the foregoing complaint; that the same is true to the knowledge of affiant, except as to
16 those matters stated on information and belief, and as to those matters, he believes them to be true.

(Signed) P. E. HARROUN.

[SEAL.] Subscribed and sworn to before me this 17th day of January, A. D. 1898.

(Signed) E. L. MEDLER,
Notary Public.

Upon reading the foregoing complaint, it is ordered that a temporary restraining order as prayed for, upon the plaintiff filing bond with sureties to be approved by the clerk of this court, in the sum of five hundred dollars, conditioned to pay all damages that may result or arise by reason of said injunction being granted, and that defendants show cause on the 25th day of January, 1898, if any they have, why said injunction should not be continued.

It is further ordered that a copy of this order be served upon said defendants at least five days before the said 25th day of January 1898, when they are required to show cause.

(Signed) J. W. CRUMPACKER, *Judge.*

Done this 17th day of January, 1898.

And afterwards, to wit, on the day and year last aforesaid, there was also filed in the office of the clerk of the district court within and for the county of Santa Fé, accompanying said transcript of record entries hereinbefore set out, from the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, an exhibit marked "Exhibit A to Complaint," which said exhibit is in words and figures following, to wit:

17 Know all men by these presents; that we, Angus A. Grant, Mariano S. Otero, Louis Ilfeld, Matthew W. Flournoy, Martin P. Stamm, William B. Childers and Owen N. Marron, each and every of whom is a citizen of the United States and a resident of the Territory of New Mexico, desiring to form a company for the purposes hereinafter set forth, have voluntarily associated ourselves together as a body politic and corporate under the laws of the Territory of New Mexico, and to that purpose we make and sign the following articles of incorporation certifying as follows, to wit:

1. The full names of the said incorporators are Angus A. Grant, Mariano S. Otero, Louis Ilfeld, Matthew W. Flournoy, Martin P. Stamm, William B. Childers and Owen N. Marron and the corporate name of said company is the Albuquerque Land and Irrigation Company.

2. The purpose for which said company is formed and created a body politic and corporate is to build, construct and maintain reservoirs, and feeders therefor, canals, ditches, pipe lines, flumes and such branch lateral and side canals, pipe lines, ditches and flumes as may be necessary for the supplying of water for the purpose of irrigation and the improvement and the colonization of lands in connection with such irrigation; and to acquire, purchase, lease and sell water, water rights, reservoirs, canals, ditches, pipe lines, flumes and lands in the furtherance of said purpose.

3. The beginning point of the main line of said canals, ditches, pipe lines and feeders for said reservoirs shall be at a point
18 on the east bank of the Rio Grande south of and near the Indian pueblo of San Felipe, in the county of Bernalillo and Territory of New Mexico, and the terminus of the said main line shall be at a point to the south near the railway bridge of the Atchison, Topeka and Santa Fe railway at Isleta, also in said county of Bernalillo. The general course and direction of said main line shall be southerly, east of the east bank of said river along and under the foot-hills through the city of Albuquerque and the length thereof shall be thirty-five miles, more or less.

3. The amount of the capital stock shall be the sum of one hundred thousand dollars, consisting of ten thousand shares, each of the par value of ten dollars.

4. The time for which said corporation is to exist is fifty years from and after the date of its corporation.

5. The number of the directors of said corporation shall be seven and the names and residences of those appointed to manage its business for the first year are, Angus A. Grant, Mariano S. Otero, Louis Ilfeld, Matthew W. Flournoy, Martin P. Stamm, William B. Childers and Owen N. Marron, each of said persons being a resident of the city of Albuquerque, in the county of Bernalillo and Territory of New Mexico.

6. The principal place of business of said corporation shall be the city of Albuquerque in the county of Bernalillo and Territory of New Mexico.

In witness whereof, we have hereunto set our hands and seals this 30th day of December, A. D. 1897.

ANGUS A. GRANT. [SEAL.]
MARIANO S. OTERO. [SEAL.]
LOUIS ILFELD. [SEAL.]
MATTHEW W. FLOURNOY. [SEAL.]
MARTIN P. STAMM. [SEAL.]
WILLIAM B. CHILDERS. [SEAL.]
OWEN N. MARRON. [SEAL.]

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

Be it remembered that on this 30th day of December, A. D. 1897, before me, the undersigned a notary public in and for the said county of Bernalillo, personally appeared Angus A. Grant, Mariano S. Otero, Louis Ilfeld, Matthew W. Flournoy, Martin P. Stamm, William B. Childers and Owen N. Marron, to me personally known to be the same persons described in and who executed the foregoing instrument and each acknowledged to me that he executed the same for the uses and purposes therein mentioned and that the same was his free act and deed.

Witness my hand and official seal the day and year in this acknowledgment first above written.

[NOTARIAL SEAL.] JOHN M. MOORE,
Notary Public, Bernalillo Co., N. M.

TERRITORY OF NEW MEXICO, }
Office of Secretary, } *ss:*

I have compared the preceding copy of the articles of incorporation of the Albuquerque Land and Irrigation Company with the original copy thereof now on file in this office and I hereby certify the same to be a correct transcript therefrom and of the whole thereof.

[TERRITORIAL SEAL.] Witness my hand and seal of the secretary of the Territory, at Santa Fé, the thirty-first day of December, one thousand eight hundred and ninety-seven.

GEO. H. WALLACE,
Secretary of New Mexico.

And afterwards, to wit, on the day and year last aforesaid, there was also filed in the office of the clerk of the district court within and for the county of Santa Fé, accompanying said transcript of record entries, hereinbefore set out, from the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, an answer and cross-complaint of said defendants, which said answer and cross-complaint is in words and figures as follows, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting within and for the County of Bernalillo.

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY, Plaintiff,
vs.
TOMAS C. GUTIERREZ, PEDRO GRIEGO Y APODACA, JESUS SAMORA, BENITO JARAMILLO, and LEON MONTOYA, Defendants.

21 *The Joint and Several Answer of the Defendants, Tomas C. Gutierrez, Pedro Griego y Apodaca, Jesus Samora, Benito Jaramillo, and Leon Montoya to the Complaint of the Plaintiff, The Albuquerque Land and Irrigation Company.*

I.

Defendants admit that the plaintiff has filed articles or incorporation as alleged in the complaint, and that by the provisions of the law under which the said plaintiff is incorporated its powers as a corporation will cease unless it shall commence the transaction of the business for which it is organized within one year from the time of filing its articles of incorporation.

II.

Upon information and belief defendants deny that the said plaintiff is organized for the purpose of constructing and maintaining reservoirs or pipe lines for the purpose of supplying water for colonization of lands, and the defendants are advised and believe and therefore charge that the said plaintiff is not entitled, for reasons hereinafter stated, to enter upon the lands or waters of any person or persons within this Territory for the purpose of surveying the same without the consent of the owner or owners of such lands or waters.

III.

These defendants are advised by counsel and believe and therefore charge that it is immaterial whether or not the plaintiff is entitled to own and hold real estate and other property
22 acquired by purchase, gift or by condemnation, for the reason as these defendants allege that they are informed and believe that the said plaintiff is not the owner of any irrigable lands along the line of the canal or ditch which the said plaintiff is proposing to construct, nor is the said plaintiff, as defendants are informed and believe, the owner of any reservoir site or other place for the hold-

ing or storing of water, nor is the said plaintiff as defendants are informed and believe the owner of any water right by or under which the said plaintiff can obtain water for its said proposed ditch or canal when the same shall be constructed, nor has the said plaintiff, as defendants are informed and believe, any contract with or employment by any person or persons owning lands irrigable from the said proposed ditch or canal when completed for carrying or delivering water to such lands but on the contrary thereof these defendants are informed and believe, and therefore charge the fact to be that the said plaintiff is proposing to divert the waters of the Rio Grande, all of which have been heretofore appropriated by these defendants and other persons to the number of many thousands of people, through its said proposed ditch or canal for the purpose of selling the same for purposes of pecuniary profit and speculation only and the said plaintiff gives out and pretends that by the construction of its said proposed ditch or canal and diverting the waters of the Rio Grande through the same, it, the said plaintiff, will acquire title to so much of the waters of the said Rio Grande as may be so diverted, and the said defendants are informed and believe and so charge that the examination and surveys which the said plaintiff is seeking and attempting to make upon the
23 lands of these defendants and their associates *is* for the purpose of locating a ditch or canal to be used for the conducting and diverting the said waters of the Rio Grande, to the use of which the said plaintiff has no right, and to which, as these defendants are advised, right of use cannot be obtained for purposes of irrigation except in connection with the ownership of land and these defendants are advised and believe and therefore charge that the said plaintiff is not empowered and could not be empowered to exercise the right of eminent domain for the securing of lands for the right of way of such a ditch or canal as the said plaintiff is proposing to construct.

IV.

Defendants admit that the proposed route of the ditch or canal of the plaintiff is as alleged in the sixth paragraph of the complaint, but the defendants on information and belief deny that the said plaintiff contemplates the construction of any pipe line or feeder for any reservoir or that the said proposed ditch or canal is to be constructed as part of any system of water storage or for the carrying of any other waters than the waters of the Rio Grande as hereinbefore alleged.

V.

Further answering the defendants say that it is probably true that the board of directors of the plaintiff employed a civil engineer as in the seventh paragraph of the complaint alleged but these defendants upon information and belief deny that said engineer was engaged in making any examination or survey for any pipe
24 line or for any other purpose than the location or selection of a route for the proposed ditch or canal as hereinbefore set forth and these defendants on information and belief deny that the

said plaintiff intends in good faith or otherwise to construct the said ditch or canal in any other manner or for any other purpose than for the carrying and diverting of the waters of the Rio Grande as hereinbefore alleged, and these defendants admit that they the said defendants and their associates did hinder and prevent the said civil engineer and other servants of the said plaintiff from entering upon and surveying the lands of these defendants and their associates, as they, the said defendants, are advised they had the lawful right to do, the owners of the said lands not having consented to such entry and survey and such attempted entry and survey over the objections and protest of the owners of said lands being as these defendants are advised unlawful.

VI.

Further answering these defendants admit that they did again on the 17th day of January, 1898, prevent the said civil engineer and other agents and servants of the plaintiff from resuming the said survey and did give out that so often as an attempt was made to resume the same upon the lands of these defendants or any of their associates, they, the said defendants and their associates, would resist and prevent the same, using no more force than might be necessary to prevent the said civil engineer and other servants of the plaintiff from trespassing on the said lands, and these
25 defendants admit that it became impossible for said engineer and other servants of said plaintiff to proceed with the said survey by reason of the resistance of these defendants and their associates, and these defendants, upon information and belief, say that they well know the purpose and object for which said survey was and is attempted to be made and that said purpose and object are as stated in this answer and not otherwise.

VII.

These defendants admit that they or some of them claim to own and do own the land mentioned in the ninth paragraph of the complaint and that they do claim that the plaintiff has no lawful right by its agents or servants to enter thereon for the purpose of making such examination and survey, but these defendants have never admitted that said land will not be damaged or injured in any way, manner or form by entrance thereon by the agents and servants of the plaintiff, but on the contrary thereof these defendants allege that they verily believe their said lands or some of the lands of some of their associates will be greatly injured and damaged by the wrongful acts of the plaintiff's servants and employés, and the said defendants on information and belief allege that the said plaintiff is without visible assets or property of any kind or description and that the said plaintiff could not be compelled by final process to respond in damages for any such injury as might be inflicted by the said plaintiff, for the reason that the said plaintiff is not the owner of any property subject to execution in the Territory of New

Mexico or elsewhere, and its only assets, so far as these defend-
26 ants are informed, consist of stock subscriptions by various persons, some of whom are, as defendants are informed and believe, insolvent, and defendants are further informed and believe that the entire amount of stock subscribed, if paid into the treasury of the plaintiff would be wholly inadequate to construct the ditch or canal proposed to be constructed, and defendants therefore charge on information and belief that said plaintiff, if entitled to exercise the right of eminent domain, is not possessed of capital sufficient to pay for the right of way and construction of such a ditch or canal as it proposes to construct, and defendants are further informed and believe that any such canal or ditch as plaintiff proposes to construct would be wholly useless unless completed for its entire length, and defendants therefore allege that plaintiff is and will be practicably unable to respond in damages for injuries which will be inflicted upon these defendants and their associates by the said plaintiff and its servants, and notwithstanding such inability on the part of said plaintiff, the said plaintiff is proceeding under the cover and protection of the restraining order heretofore granted in this case, to injure and damage the lands of these defendants and their associates before these defendants and their associates can be heard as to their right to resist and prevent such injury. And these defendants deny that their acts if continued would have resulted or will result in irreparable injury to the plaintiff or that the said plaintiff is entitled to the relief prayed for in and by its said complaint or any part of such relief.

27 VIII.

Further answering these defendants allege that they and their associates to the number of many thousand persons and their several ancestors, grantors and predecessors in title have, for long periods of time, extending back in some instances for centuries, and in no instance for a less period than fifty years, used the waters of the Rio Grande for the purpose of irrigating their lands and for their animals and other domestic purposes, and have diverted the same to the extent of the full flow of said waters by means of divers ditches and acequias constructed and maintained by them, and have applied the said waters to the full extent of their flow during the planting and growing season for the irrigation of their lands, so that there is not and has not been for many years during the planting and growing season any surplus water or any more water than was actually and necessarily used by these defendants and their associates in and about the irrigation of their lands and for their live stock and necessary domestic purposes, and that said plaintiff cannot divert any part of the waters of said Rio Grande into its proposed ditch or canal without interfering with the rights of these defendants and their associates, to use the waters of Rio Grande as they and their associates and their ancestors and predecessors in title have been accustomed to use the same for more than fifty years last past, and these defendants upon information and belief aver that it is the purpose and intention of the said plaintiff,

if it succeeds in constructing its said canal or ditch, to divert during
the planting and growing season so much of the waters
28 of said Rio Grande as their said proposed ditch or canal will
carry, and to claim that the same are surplus and unappropriated waters of the said Rio Grande and subject to be diverted by it under the provisions of the law under which the said plaintiff is incorporated; but these defendants aver that there is no surplus of the waters of the Rio Grande which is subject to be appropriated by the plaintiff under the provisions of the said law, but on the contrary thereof the said waters to the full extent of their flow had been appropriated by these defendants and their associates and their ancestors, grantors and predecessors in title for a period of more than fifty years before the incorporation of the said plaintiff, and the right of the said defendants and their associates and their ancestors, grantors and predecessors in title, to so appropriate and use the waters of the Rio Grande to the full extent of their flow as aforesaid had become fixed and vested for a period of more than fifty years before the passage of the law under which the said plaintiff is incorporated.

IX.

Further answering these defendants aver that they are advised by counsel and believe and therefore charge that the said Rio Grande is one of the streams intended to be referred to in section twenty-five of the law under which the plaintiff is incorporated and that the waters thereof are within the restriction contained in said section, that no corporation of any company or companies to supply water for the purposes of irrigation and other purposes, shall have any
right to divert the usual and natural flow of water of any
29 stream for any use whatever between the fifteenth day of
February and the fifteenth day of October of each year unless it be with the unanimous consent of all and every person holding agricultural and cultivated lands under such stream and to be irrigated by the water furnished by said stream and said defendants are advised by counsel and charge that no corporation organized under the provisions of said law can acquire the right to divert the usual and natural flow of waters of the Rio Grande between the fifteenth day of February and the fifteenth day of October in each year without the consent of these defendants and their associates and these defendants aver that the said plaintiff has not obtained and cannot obtain the consent of these defendants and their associates to the diversion of the natural flow of such waters and these defendants further aver that the proposed ditch or canal of the said plaintiff will be a public and private nuisance unless the said plaintiff can acquire the right to divert a portion of the waters of the Rio Grande through the same.

X.

Further answering these defendants aver that they are advised by counsel and believe and therefore charge that by the laws of the Republic of Mexico in force at the time of the acquisition of the

Territory of New Mexico by the United States of America (as well as by the laws of Spain when the present Territory of New Mexico was subject to the dominion of the Spanish crown) the owners of lands adjacent to any stream of water not navigable were permitted to appropriate the waters thereof or so much of said waters as
30 might be necessary for the irrigation of their lands and for their animals and other domestic purposes and by such appropriation of said water the owners of such lands acquired a right to divert the same from their usual and natural course and to apply the same to the irrigation of their lands and for the domestic purposes incident to the cultivation of the soil. And these defendants further aver that their ancestors, grantors and predecessors in title, were owners and proprietors of lands adjacent to the Rio Grande at the time of the acquisition of the Territory of New Mexico by the United States of America and had acquired, prior to such acquisition of the said Territory of the United States, the right to irrigate their lands with the waters of the Rio Grande and had acquired a vested right to use and divert the entire flow of the said waters of the Rio Grande through ditches or acequias constructed and maintained by them for the purpose of irrigating their said lands, nearly all of which lands are now owned by these defendants and their associates and these defendants are advised by counsel and believe and therefore charge that the right to the use of the waters of the Rio Grande so acquired by the ancestors, grantors and predecessors in title, of these defendants, under the laws of Spain or of the Mexican Republic, are appurtenant to the said lands to the irrigation of which the said waters were so applied and as such pass by the conveyance of descent of the said lands and are fully guaranteed and protected by the terms of the treaty between the United States of America and the Republic of Mexico, known as the treaty of Guadalupe Hidalgo, and are not subject to be impaired or
31 divested by any law of the United States or of the Territory of New Mexico and these defendants therefore aver that any law of the Territory of New Mexico which purports in any manner to impair or restrict any of said rights is void and of no effect, and no person or corporation can by virtue of any such pretended law, interfere with the rights of these defendants and their associates, so acquired by their ancestors, grantors and predecessors in title under the laws of Spain and Mexico, as hereinbefore alleged and set forth.

XI.

Further answering these defendants aver that they are advised by counsel, and believe, and therefore charge, that by the laws of the United States in force at the time of the passage of the law under which the plaintiff is incorporated, no title to the waters of any natural stream which is not navigable can be acquired for any purpose whatever, but a right to the use of such waters only, may be acquired for the purpose of irrigating, mining and manufacturing, and these defendants are further advised and believe, and therefore charge, that under the said laws of the United States no person or corporation can acquire any right to divert the natural

flow of the waters of any such stream for the purposes of irrigation except as an incident to the ownership or occupation of lands, and these defendants therefore aver that the said plaintiff, not being the owner or occupier of any of the lands to be irrigated from its said proposed ditch or canal cannot acquire the right to divert any part of the waters of the Rio Grande through its said ditch or canal for the purpose of sale and the corporate powers of the plaintiff under
32 its articles of incorporation, confer upon the plaintiff no right to construct any ditch or canal for the diversion of any part of the waters of the Rio Grande until or unless the said plaintiff has acquired the ownership or occupation of lands to be so irrigated, or has been engaged or employed by persons owning or occupying lands, irrigable from the said ditch or canal to conduct a portion of the waters of said Rio Grande to such lands, and these defendants, on information and belief, aver that the said plaintiff is not the owner or occupier of any such lands, and has no such engagement or employment, nor any purpose or intention to attempt to obtain the same, but on the contrary thereof the said plaintiff intends to rely entirely on its ownership of the said water to be acquired by the construction and maintenance of said ditch or canal and the diversion of the said waters through the same, and will claim the right to sell the said waters to such consumers as will comply with such terms as the said plaintiff shall see proper to fix and impose, and to refuse to deliver water from the said ditch or canal to all persons who fail or refuse to submit to the terms so fixed and imposed by it, and on information and belief these defendants aver that the said plaintiff seeks and intends to monopolize and control, so far as it can do so, the supply of water available for the purposes of irrigation of the lands along the route of its said proposed ditch or canal for pecuniary profit and speculation only, and these defendants, on information and belief, further aver that it is not the purpose or intention of the said plaintiff to apply any portion of the waters so intended to be diverted by it to any other use
33 or purpose than to sell the same for pecuniary profit and speculation as aforesaid.

XII.

Having fully answered the complaint of the plaintiff the said defendants by way of cross-complaint against the plaintiff and as ground for affirmative relief against the said plaintiff alleges.

I.

That these defendants and cross-plaintiffs and their associates to the number of many thousands of persons including the owners of many ditches or acequias who are by the laws of the Territory of New Mexico empowered as bodies corporate to sue and be sued, the associates of these defendants and cross-plaintiffs being so numerous as to render it impracticable to bring all before the court, are the owners of lands which for centuries have been irrigated from the waters of the Rio Grande and for the irrigation of which during the planting and growing season of each year the entire flow of the

waters of said Rio Grande are necessary for the nourishment of the crops of grain, beans, chili, grapes, fruits and other products of the soil which they and their associates and their ancestors, grantors and perdecessors in title, have been accustomed from time immemorial to grow upon the said lands and without which said waters for such purposes of irrigation agriculture is impossible in the valley of the Rio Grande where the said lands are situated.

II.

34 That the plaintiff and cross-defendant, The Albuquerque Land and Irrigation Company, is *a*t corporation created, organized and existing under the laws of the Territory of New Mexico and having its principal office and place of business at Albuquerque, in the county of Bernalillo, in said Territory.

III.

That the said plaintiff and cross-defendant is proposing to construct a canal or ditch beginning at a point on the east bank of the Rio Grande south of and near the Indian pueblo of San Felipe in the county of Bernalillo and Territory of New Mexico and the terminus of said main line shall be at a point to the south near the railway bridge of the Atchison, Topeka and Santa Fé railway, at Isleta, also in said county of Bernadillo. The general course and direction of said main line shall be southerly, east of the east bank of said river along and under the foot-hills through the city of Albuquerque and the length thereof shall be thirty-five miles, more or less, for the purpose of diverting what it claims to be the surplus waters of the Rio Grande through its said canal or ditch for the purpose of selling the same for pecuniary profit and speculation and not for the purpose of applying any of said waters to the irrigation of any lands owned or occupied by it.

IV.

Defendants and cross-complainants are informed and believe and therefore charge that the said plaintiff and cross-defendant is not
35 the owner or occupier of any lands which can be irrigated with water conducted through the said proposed canal or ditch nor is it the owner of any reservoir site or reservoir or other means or appliance for the storage of water for the supply of its said proposed canal or ditch nor is it the owner of any water right or of any water with which it may conduct the business for which it purports to be organized, but on the *the* contrary thereof the said plaintiff and cross-defendant will as they are informed and verily believe rely solely and entirely upon such ownership of the waters of the Rio Grande as it can acquire by the construction and maint*a*inance of its proposed ditch or canal and the diversion of such waters by means thereof and will claim the right to sell and dispose of such water to such persons as will submit to and comply with the terms to be fixed and imposed by it and for such purposes as the consumers and users of said water shall see fit to apply the same, and will refuse and decline to permit any person to take any water

whatever from its said propose- ditch or canal without the payment of such charges and the compliance with such terms as it shall so impose and will claim to be the exclusive owner of so much of the waters of the Rio Grande as shall be diverted through and by means of its said proposed ditch or canal with the right to vend and sell the same for pecuniary profit and speculation.

V.

These defendants and cross-plaintiffs further aver that they and their associates to the number of many thousand persons and their several ancestors, grantors and predecessors in title, for long
36 periods of time extending back in some instances for centuries and in no instance for less than fifty years used the waters of the Rio Grande for the purpose of irrigating their lands and for their animals and other domestic purposes and have diverted the same to the extent of the full flow of said waters by means of divers ditches and acequias constructed and maintained by them and have applied the said waters to the full extent of their flow during the planting and growing season to the irrigation of their lands so that there is not and has not been for many years during the planting and growing season any surplus water or any more water than was actually and necessarily used by these defendants and cross-plaintiffs and their associates in and about the irrigation of their lands and their live stock and other domestic purposes and that said plaintiff and cross-defendant cannot divert any part of the waters of the said Rio Grande into its proposed ditch or canal without interfering with the rights of these defendants and cross-plaintiffs to use the said waters of the Rio Grande as they and their associates and several ancestors, grantors and predecessors in title, have been accustomed to use the same for more than fifty years last past and these defendants and cross-plaintiffs upon information and belief, aver that it is the purpose and intention of the said plaintiff and cross-defendant if it succeeds in constructing its said canal or ditch to divert, during the planting and growing season, so much of the waters of the Rio Grande as their said proposed canal or ditch will carry and to claim that the same are the surplus and unappropriated waters of the said Rio Grande and subject to be diverted by it under the
37 provision of the law under which it is incorporated, but these defendants and cross-plaintiffs aver that there is no surplus of the waters of the Rio Grande which is subject to be appropriated by the plaintiff and cross-defendant under the provisions of the said law, but on the contrary thereof the said waters to the full extent of their flow had been appropriated by these defendants and cross-plaintiffs and their associates and their several ancestors, grantors and predecessors in title, for a period of more than fifty years before the incorporation of the said plaintiff and cross-defendant, and the right of the said defendant and cross-plaintiffs and their associates and their several ancestors, grantors and predecessors in title, to so appropriate and use the waters of the Rio Grande to the full extent of their flow as aforesaid had become fixed and vested for a period

of more than fifty years before the passage of the law under which the said plaintiff and cross-defendant is incorporated.

VI.

These defendants and cross-plaintiffs further aver that they are advised by counsel and believe and therefore charge that the said Rio Grande is one of the streams intended to be referred to in section twenty-five of the law under which the plaintiff and cross-defendant is incorporated and that the waters thereof are within the restriction contained in said section, that no incorporation of any company or companies to supply water for the purpose of irrigation and other purposes, shall have any right to divert the usual and natural flow of water of any such stream for any use whatever between the fifteenth day of February and the fifteenth day of
38 October of each year, unless it be with the unanimous consent of all and every person holding agricultural and cultivated lands under such stream and to be irrigated by the water furnished by said stream and said defendants and cross-plaintiffs are advised by counsel and charge that no corporation organized under the provisions of said law can acquire the right to divert the usual and natural flow of the waters of the Rio Grande between the fifteenth day of February and the fifteenth day of October in each year, without the consent of these defendants and cross-plaintiffs and their associates and these defendants and cross-plaintiffs aver that the said plaintiff and cross-defendant has not obtained and cannot obtain the consent of these defendants and cross-plaintiffs and their associates to the diversion of the natural flow of such waters and these defendants and cross-plaintiffs further aver that the proposed ditch or canal of the said plaintiff and cross-defendant will be a public and private nuisance unless the said plaintiff and cross-defendant can acquire the right to divert a portion of the waters of the Rio Grande through the same.

VII.

The defendants and cross-plaintiffs further aver that they are advised by counsel and believe and therefore charge that by the laws of the Republic of Mexico in force at the time of the acquisition of the Territory of New Mexico by the United States of America (as well as by the laws of Spain when the present Territory of New Mexico was subject to the dominion of the Spanish Crown) the owners of lands adjacent to any stream of water not navigable
39 were permitted to appropriate the waters thereof or so much of said waters as might be necessary for the irrigation of their lands and for their animals and other domestic purposes and by such appropriation of said waters the owners of such lands acquired a right to divert the same from their usual and natural course and to apply the same to the irrigation of their lands and for the domestic purposes incident to the cultivation of the soil. And these defendants and cross-plaintiffs further aver that their ancestors, grantors and predecessors in title, were owners and proprietors of

lands adjacent to the Rio Grande at the time of the acquisition of the Territory of New Mexico by the United States of America and had acquired, prior to such acquisition of the said Territory by the United States, the right to irrigate their lands with the waters of the Rio Grande and had acquired a vested right to use and divert the entire flow of the said waters of the Rio Grande through ditches and acequias constructed and maintained by them for the purpose of irrigating their said lands nearly all of which lands are now owned by these defendants and cross-plaintiffs and their associates, and these defendants and cross-plaintiffs are advised by counsel and believe and therefore charge that the right to the use of the waters of the Rio Grande so acquired by the ancestors, grantors and predecessors in title of these defendants and cross-plaintiffs under the laws of Spain or of the Mexican Republic, are appurtenant to the said lands to the irrigation of which the said waters were so applied and, as such, pass by the conveyance or descent of the said lands and are fully guaranteed and protected by the terms of the treaty
40 between the United States of America and the Republic of Mexico, known as the treaty of Guadalupe Hidalgo, and are not subject to be impaired or divested by any law of the United States or of the Territory of New Mexico and these defendants and cross-plaintiffs therefore aver that any law of the Territory of New Mexico which purports in any manner to impair or restrict any of said rights is void and of no effect, and no person or corporation can by virtue of any such pretended law interfere with the rights of these defendants and cross-plaintiffs and their associates so acquired by their respective ancestors, grantors and predecessors in title, under the laws of Spain and Mexico as hereinbefore alleged and set forth.

VIII.

These defendants and cross-plaintiffs further aver that they are advised by counsel and believe and therefore charge that by the laws of the United States, in force at the time of the passage of the law under which the plaintiff and cross-defendant is incorporated no title to the waters of any natural stream which is not navigable can be acquired for any purpose whatever, but a right to the use of such waters only, may be acquired for the purposes of irrigation, mining and manufacturing, and these defendants and cross-plaintiffs are further advised and believe and therefore charge that under the said laws of the United States no person or corporation can acquire any right to divert the natural flow of the waters of any such stream for the purposes of irrigation except as an incident to the owner-
41 ship or occupation of lands, and these defendants and cross-plaintiffs therefore aver that the said plaintiff and cross-defendant not being the owner of any lands to be irrigated from its said proposed ditch or canal, cannot acquire the right to divert any part of the waters of the Rio Grande through its said ditch or canal, for the purpose of sale, and the corporate powers of the plaintiff and cross-defendant, under its articles of incorporation, confer upon the plaintiff and cross-defendant no right to construct any ditch or canal for the diversion of any part of the waters of the Rio

Grande until or unless the said plaintiff and cross-defendant has acquired the ownership or occupation of lands to be so irrigated or has been engaged or employed by persons owning and occupying lands, irrigable from said ditch or canal, to conduct a portion of the waters of said Rio Grande to such lands, and these defendants and cross-plaintiffs on information and belief aver that the said plaintiff and cross-defendant is not the owner or occupier of any such lands, and has no such engagement or employment nor any purpose or intention to attempt to obtain the same; but on the contrary thereof the said plaintiff and cross-defendant intends to rely entirely on its ownership of the said water to be acquired by the construction and maintenance of said ditch or canal, and the diversion of the said water through the same, and will claim the right to sell the said waters to such consumers as will comply with such terms as the said plaintiff and cross-defendant shall see proper to fix and impose, and to refuse to deliver water from the said ditch or canal to all persons who fail or refuse to submit to the terms so fixed and imposed by it, and on information and belief these de-
42 fendants and cross-plaintiffs aver that the said plaintiff and cross-defendant seeks and intends to monopolize and control, so far as it can do so, the supply of water available for the purposes of irrigation of the lands along the route of its said proposed ditch or canal for pecuniary profit and speculation only, and these defendants and cross-plaintiffs, on information and belief, further aver that it is not the purpose or intention of the said plaintiff and cross-defendant to apply any portion of the waters so intended to be diverted by it to any other use or purpose than to sell the same for pecuniary profit and speculation as aforesaid.

IX.

These defendants and cross-plaintiffs are advised by counsel and believe and therefore charge that the said plaintiff and cross-defendant, although incorporated under the laws of the Territory of New Mexico, as in said complaint alleged, for the reasons hereinbefore stated and alleged, is not authorized by law to exercise the right of eminent domain or to enter upon the lands of any person or persons within this Territory for the purpose of making any examination or survey thereof, without the consent of the owner or owners of such lands, nor is the said plaintiff and cross-defendant authorized to build or construct its proposed ditch or canal for the purpose for which the same is intended to be built, but all of the acts and proceedings of said plaintiff and cross-defendant done and sought and attempted to be done are in violation of the legal and equitable rights of these defendants and cross-plaintiffs. Wherefore the said defendants and cross-plaintiffs pray that the said plaintiff and cross-defendant may be by the order
43 and decree of this honorable court restrained and enjoined from entering upon or attempting to enter upon the land of these defendants and cross-plaintiffs or their associates for the purpose of making any examination or survey thereof, for the purpose of locating the route of the said proposed canal or ditch, and from

exercising or attempting to exercise the right of eminent domain in order to secure the right of way for said proposed canal or ditch and from diverting or attempting to divert through or by means of its said proposed canal or ditch any of the waters of the Rio Grande, and from interfering in any manner with the use, by these defendants and cross-plaintiffs and their associates, of the said waters of the Rio Grande in the manner and to the extent that these defendants and cross-plaintiffs and their associates and their several ancestors, grantors and predecessors in title, have been accustomed to use the said waters until the further order of this court, and that on final hearing the said injunction may be made perpetual, and that these defendants and cross-plaintiffs may have such other and further relief as may be proper in the premises.

NEILL B. FIELD,
Attorney for Defendant.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

Tomas C. Gutierrez, Pedro Griego y Apodaca, Jesus Samora, Benito Jaramillo, Leon Montoya, being duly sworn, each for himself and not one for the other, on his oath deposes and says that he has heard read the foregoing answer and cross-complaint and knows the contents thereof and that the allegations therein contained are true of his own knowledge except as to those matters which are stated on information and belief, and as to such matters he believes the same to be true.

TOMAS C. GUTIERREZ.
JESUS A. SAMORA.
PEDRO GRIEGO Y APODACA.
BENITO his x mark. JARAMILLO.
LEON his x mark. MONTOYA.

Subscribed and sworn to before me by Tomas C. Gutierrez, Pedro Griego y Apodaca, Jesus Samora, Benito Jaramillo and Leon Montoya, this 22d day of January, 1898.

[SEAL.]

HARRY F. LEE,
Notary Public.

And afterwards, to wit, on the day and year last aforesaid, there was also filed in the office of the clerk of the district court within and for the county of Santa Fé, accompanying said transcript of record entries, hereinbefore set out, from the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, the answer of the said plaintiff to the new matter contained in the answer of the said defendants, which said answer is in words and figures following, to wit:

ALBUQUERQUE LAND & IRRIGATION COMPANY, Plaintiff,
vs.
TOMAS C. GUITERREZ ET AL., Defendants.

45 *The Answer of the said Plaintiff to the New Matter Contained in the Answer of the said Defendants to the Complaint in this Cause.*

Plaintiff denies that all of the water of the said Rio Grande river has been appropriated, as alleged in the new matter in said answer, and further denies that there is no surplus water in the said Rio Grande which can or may be taken and used by the plaintiff.

Plaintiff further says that the water taken for use by the system of community ditches, from the operation and conduct of which defendants and their associates have or may have been using the same, has been properly used, but on the contrary thereof that the same has been taken in wasteful quantities, unreasonably used and after use the same has not been returned to the channel from which it was diverted, and that by reason of said unreasonable use and by not returning the same to said Rio Grande, a great per cent. thereof has been wasted, to wit: more than fifty per cent. of the amount actually diverted from said river; and that were said water reasonably used and returned to the river from whence diverted, the surplus which now remains over and above the said taking and use would be far more than plaintiff is seeking to appropriate by the taking out of its said ditch.

Plaintiff further says that the supply of water, between the 15th day of February and the 15th day of October, is in many years more than sufficient for defendants and their supposed associates, and in every year on days other than between the said 15th
46 day of February and the 15th day of October, vast quantities of said water may be stored in reservoirs, and if necessary hereafter for the supplying of its customers and patrons applying water to a beneficial use for said reservoirs to be constructed it is the intention of the plaintiff to construct such reservoirs.

Plaintiff further alleges that between the 15th day of October and the 15th day of February, in each and every year, all the water flowing through the channel of said river is unappropriated and not used by anybody, which said water so going to waste the said plaintiff proposes if necessary to the carrying on of its business to divert by means of the proposed canal and pipe lines and reservoirs, thereby storing the same for use of its patrons and the public in general who may see fit to take water from said plaintiff.

Plaintiff further answering, denies that it proposes to divert and appropriate water out of said river purely for speculative purposes, and alleges the fact to be that it is a public corporation incorporated for the purpose of supplying water for the general use of such owners of irrigable lands as see fit to patronize it, and that such appropriation is under the law a beneficial use.

Plaintiff further alleges that the owners of at least 850 acres of land, now irrigating by water taken from said river, and who have

an absolute right to take water from said river as appertaining to said land, have entered into contracts with the promoters and organizers of the plaintiff company to take water for the irrigation of their lands from said company so soon as its said ditch shall be constructed; and plaintiff further alleges that it is the
47 beneficial owner of said contracts and that the said promoters, with whom said contracts were made, have agreed to assign and set over said contracts to said plaintiff whenever said plaintiff company demands the assignment of the same; and plaintiff further alleges that many other persons, owners of lands now irrigated by water taken from said river, are ready and willing and offer to take water from said company out of its said ditch when constructed for the purpose of irrigating the lands now being cultivated by them.

Plaintiff further alleges that said company was organized not for speculative purposes but for the purpose of developing and conserving the water now going to waste through the channel of said river, and not for the purpose of gain and speculation, and with no intention to interfere with the vested rights of any person or persons or ditch company whatsoever who may have any prior right to the water in said river; it being the purpose and object of said plaintiff to promote the development and prosperity of the country through which said ditch is to run, and that the sole advantage that the organizers and subscribers to the stock of said company expect to gain is the increase in the general value of the property which they may own in the community in which they reside.

And plaintiff by filing this answer does not waive the benefit of a demurrer to the answer of defendants and the cross-complaint filed by them, but expressly claims the same benefit thereof as if it had expressly demurred thereto.

48 *The Answer of the Plaintiff and Cross-defendant to the Cross-complaint of the Defendants.*

I.

Plaintiff and cross-defendant denies that the defendants and cross-plaintiffs have any right to appear or defend for their associates, numbering many thousands, or for and on behalf of community, ditches or acequias, which, by the act of the Legislative Assembly of the Territory of New Mexico, approved February 28, 1895, were created bodies corporate; and denies that the entire flow of the waters of the Rio Grande are necessary for the irrigation of the land owned by them and for the nourishment of the crops of grain, beans, chili, grapes, fruits and other products of the soil, as alleged in paragraph I of said cross-complaint.

II.

Plaintiff and cross-defendant admits that it is a corporation created, organized and existing under the laws of the Territory of New Mexico, with its principal place of business at Albuquerque in the county of Bernalillo, in said Territory.

III.

Plaintiff and cross-defendant admits that it is proposing to construct a canal or ditch as alleged in paragraph III of the cross-complaint, but denies that the objects of its incorporation and the taking of waters and supplying of the same to owners of land, are for pecuniary profit and speculation and not for the purpose of applying any of said waters to the irrigation of any lands owned or occupied by it.

49

IV.

Plaintiff and cross-defendant denies that it is not the owner or occupier of any lands which can be irrigated with water conducted through its proposed canal or ditch, and denies that it is not the owner of any water right or of any water with which it may conduct the business for which it was organized; and denies that it intends to solely and entirely rely upon such ownership of the waters of the Rio Grande as it can acquire by the construction and maintenance of its proposed canal or ditch, and its diversion of such waters by means thereof; but alleges that the owners of at least eight hundred and fifty acres of land now irrigated by water taken from said river and who have had the absolute right to take water from such river as appurtenant to said land, have entered into contracts with the promoters and organizers of the plaintiff company to take water for the irrigation of their lands from said company so soon as its said ditch shall be constructed. And plaintiff and cross-defendant further answering, alleges that it is the beneficial owner of said contracts and that the promoters with whom said contracts were made have agreed to assign and set over same to the plaintiff and cross-defendant whenever it demands the assignment of the same; and plaintiff and cross-defendant further alleges that many other persons, owners of lands now irrigated by water taken from said river, are ready and willing and offer to take water from said company out of said ditch when it is constructed, for the purpose of irrigating lands now being cultivated by them. And further answering,
50 alleges that the said company was organized not for speculative purposes, but for the purpose of developing and conserving the water now going to waste through the channel of said river, and not for the purpose of gain and speculation; and denies that it will dispose of any water which may pass through its proposed canal or ditch to consumers to be used for any purpose they may see fit to apply the same; and on the contrary, alleges, that the objects and purposes of the corporation are for the purpose of irrigation and improvement and colonization of lands; and denies that it proposes to divert and appropriate water out of said river purely for speculation; and alleges that it is a public incorporation, incorporated for the purpose of supplying water and for the general use of such owners of irrigable lands as see fit to patronize it, and that such appropriation is under the law of beneficial use.

V.

Plaintiff and cross-defendant denies that the said defendants and cross-plaintiffs have any right to interpose a defense for any of their associates who are not parties to this suit, or for and on behalf of any ditches or acequias, which, by the laws of the Territory of New Mexico, are bodies corporate; and denies that said parties have for centuries, and in no instance for less than fifty years, diverted all the waters of said Rio Grande by means of divers ditches and acequias constructed and maintained by them, and applied it as aforesaid to its full extent as in paragraph V of said cross-complaint alleges; and further answering, plaintiff and cross-defendant alleges that the
51 water taken by the defendants and cross-plaintiffs for use by system of community ditches, has been improperly used, and that the same has been taken in wasteful quantities, unreasonably used and after user, the same has not been returned to the channel from which it was diverted, and that by reason of such unreasonable use and by not returning the same to the said Rio Grande, a great per cent. thereof has been wasted, to wit: fifty per cent. of the amount actually diverted from said river, and if said waters were reasonably used and retured to the river from whence diverted, the surplus which now remains over and above the said taking and user would be far more than plaintiff is seeking to appropriate by taking out of its said ditch. Further answering, plaintiff and cross-defendant alleges that there is at all times of the year a surplus of water over and above what is used by the defendants and cross-plaintiffs for any beneficial use by any of them or for the purpose of irrigating their lands or watering their live stock and for other domestic purposes, or any other purpose for which they might have a right to use the same.

VI.

Plaintiff and cross-defendant further answering, alleges that it is advised and believes that the construction placed upon section 25 of the law under which the plaintiff company is incorporated, as alleged by the defendants in paragraph VI. of the cross-complaint, is incorrect; and that the Rio Grande is not such a stream as is referred to in said section, whereby companies formed under
52 said act are prevented from diverting the usual and natural flow of water for any use whatever, between the 15th of February and the 15th of October, of each year, without the unanimous consent of all and every person holding agricultural and cultivated lands under such stream and to be irrigated by the waters furnished by such stream; and plaintiff and cross-defendant further answering, denies that the ditch or canal which it is proposed to construct, will be a public or private nuisance unless it can acquire a right to divert a portion of the waters of the Rio Grande through the same.

VII.

Plaintiff and cross-defendant further answering, upon information and belief and advice of counsel, denies that the defendants and cross-plaintiffs under and by virtue of the laws of the Republic

of Mexico, in force at the time of the acquisition of the Territory of New Mexico, by the United States of America, or their ancestors, grantors, and predecessors in title, have acquired a vested right to use and divert the entire flow of the waters of the Rio Grande through ditches and acquias constructed and maintained by them, for the purpose of irrigating their lands as alleged and set forth in paragraph VII of said cross-complaint; and deny that the right to the use of the waters of the Rio Grande so alleged to have been acquired by the defendants and cross-plaintiffs and their ancestors, grantors and predecessors in title, under the laws of Spain or of the Mexican Republic, are protection to said lands to the irrigation of which the said waters were so applied, and as such passed by the con-
53 veyance or descent of the said lands; and deny that the same are fully guaranteed and protected by the terms of the treaty between the United States of America and the Republic of Mexico, known as the treaty of Guadaloupe Hidalgo; and deny that the same are not subject to be impaired or divested by the laws of the United States or of the Territory of New Mexico.

VIII.

Further answering, plaintiff and cross-defendant, denies that under the laws of the United States in force at the time of the passage of the law under which this plaintiff and cross-defendant is incorporated, no person or corporation could acquire any right to divert the natural flow of the water of any such stream for the purpose of irrigation, except as is incident to the ownership or occupation of lands, if by said averment, it is intended to charge that the person or corporation diverting water must be the owner or occupant of the land; and denies that it has not the right to divert any part of the water of the Rio Grande through its said ditch or canal; and denies that it has no right to construct any ditch or canal for the diversion of any part of the waters of the Rio Grande until it has acquired the ownership or occupation of lands to be so irrigated, or has been engaged or employed by persons owning or occupying lands irrigable from said water from said ditch or canal to conduct a part of the water of the Rio Grande to such lands; and plaintiff and cross-defendant alleges, as it has hereinbefore stated, that it has made contracts with numerous persons to furnish them water,
54 whose lands are adjacent to and irrigable and have been irrigated by waters taken from the said Rio Grande by community ditches and otherwise; and denies that it intends to rely entirely upon its ownership of the said water to be acquired by the construction and maintenance of its said ditch and canal; and denies, as hereinbefore denied, that said ditch is being constructed for speculative purposes; and plaintiff and cross-defendant further answering, alleges that under and by virtue of the powers conferred upon it by the act under which it is created, it has the right to construct and maintain reservoirs for the purpose of storing water to be conducted through its said ditches and canals for the purpose of irrigating lands, as well as the right which it claims to take water from the said Rio Grande.

IX.

Plaintiff and cross-defendant further answering, denies that under and by virtue of the laws of New Mexico under which it is created, it has no right to exercise the right of eminent domain or to enter upon the lands of any person or persons in this Territory for the purpose of making any examination or survey thereof, without the consent of the owner or owners of such land; and denies that it is not authorized to construct its proposed ditch or canal for the purpose for which it is intended to be built; and denies that any of its objects done and sought or attempted to be done are in violation of the legal and equitable rights of said defendants and cross-plaintiffs; and plaintiff and cross-defendant denies that the defendants and
55 cross-plaintiffs are entitled to an injunction enjoining and restraining it from entering upon, or attempting to enter upon the lands of the said defendants or their associates for the purpose of making an examination and survey thereof, for the purpose of locating the route of its proposed ditch, canal or pipe line, or from exercising any rights of eminent domain in order to carry out the objects of its incorporation.

CHILDERS & DOBSON,
COLLIER & MARRON,
Attorneys for Plaintiffs.

TERRITORY OF NEW MEXICO, }
County of Bernalillo, } *ss*:

C P. Stamem, being duly sworn, upon oath deposes and says that he is a director and agent of the plaintiff and cross-defendant for the purpose of making this affidavit; that he has read the foregoing answer and knows the contents thereof, and that the same are true except as to those matters stated on information and belief, and as to those matters, he believes them to be true.

(Signed) C. P. STAMEM.

Subscribed and sworn to before me this 11th day of March, 1898.

S. GRUNSFELD,
[NOTARIAL SEAL.] *Notary Public.*

And thereafter, to wit, on the day and year last aforesaid, there was filed in the office of the said clerk of the district court within and for the county of Santa Fé, accompanying said transcript
56 of record entries hereinbefore set out from the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, the reply of cross-plaintiff to new matter contained in the answer of the cross-defendant, which said reply is in words and figures following, to wit:

TERRITORY OF NEW MEXICO:

Bernalillo District Court.

ALBUQUERQUE LAND AND IRRIGATION CO., Plaintiffs,
vs.
TOMAS C. GUTIERREZ ET AL., Defendants. } No. 4956.

and

TOMAS C. GUTIERREZ ET AL., Cross-plaintiffs,
vs.
ALBUQUERQUE LAND AND IRRIGATION CO., Cross-defendants.

Reply of Cross-plaintiff to New Matter Contained in the Answer of Cross-defendant, The Albuquerque Land and Irrigation Company to the Cross-complaint.

I.

Cross-plaintiffs on information and belief deny that the owners of at least eight hundred and fifty acres of land now irrigated by water from said river, who have the absolute right to take water from said river as appurtenant to said land, have entered into contracts with the promoters and organizers of the cross-defendant company to take water for the irrigation of their lands so soon as its said
57 ditch shall be constructed, or that the said cross-defendant company is the beneficial owner of said contracts, and the said cross-plaintiffs on information and belief, also deny that any other persons, owners of lands now irrigated by water taken from said river, are ready or willing or offer to take water from said company out of the said ditch of the cross-defendants, when constructed, for the purpose of irrigating lands now being cultivated by them.

II.

Cross-plaintiffs further deny that water taken by cross-plaintiffs and their associates for use by their systems of community ditches has been improperly used, or that the same has been taken in wasteful quantities; or that the same has been used unreasonably; or that the same has not been returned to the channel of the river from which it was diverted, after use, or that by reason of said unreasonable use, or by not returning same to said Rio Grande, a great per cent. thereof has been wasted, to wit, fifty per cent., or any other portion of the amount actually diverted from said river. And said cross-plaintiffs further deny that if said waters were reasonably used and returned to the river from whence diverted, any surplus would remain over and above the said amount taken, required and used by these cross-plaintiffs and their associates. And these cross-plaintiffs further deny that there is at all times of the year a surplus of water over and above what is used by these cross-plaintiffs and their associates for bene-

ficial purposes and for irrigating their lands and watering their live stock, and for other domestic purposes.

58 Where*of*, the cross-plaintiffs pray as in their cross-complaint.

NEILL B. FIELD,
Attorney for Cross-plaintiff.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

Tomas C. Gutierrez being first duly sworn, upon his oath deposes and says that he has read the foregoing reply, and knows the contents thereof, and that the allegations therein contained are true, except as to those matters stated upon information and belief, and as to those matters, he believes them to be true.

T. C. GUTIERREZ.

Subscribed and sworn to before me by Tomas C. Gutierrez, this 14th day of March, 1898.

[SEAL.] HARRY F. LEE,
Notary Public.

And afterwards, to wit, on the day and year last aforesaid, there was also filed in the office of the clerk of the district court within and for the county of Santa Fé, accompanying said transcript of record entries, hereinbefore set out, from the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, a writ of injunction, which said writ is in words and figures following, to wit:

ALBUQUERQUE LAND AND IRRIGATION CO. }
vs.
T. C. GUTIERREZ ET AL. }

To Tomas C. Gutierrez, Pedro Griego y Apodaca, Jesus
59 Samora, Benito Jaramillo, Leon Montoya, their agents, confederates, and assistants:

You and each of you are hereby commanded, ordered and enjoined that you do henceforth refrain, desist and cease from hindering, preventing, obstructing and delaying the plaintiff, The Albuquerque Land and Irrigation Company, its agents, servants and employés from proceeding with the examination and survey by obstructing, preventing and hindering their entrance upon and along lands lying and being at, near and along a proposed, route for a canal, ditch and pipe line beginning at a point on the east bank of the Rio Grande south or near the Indian pueblo of San Felipe in the county of Bernalillo and Territory of New Mexico, and the terminus of said main line to be at a point south near the railway bridge of the Atchison, Topeka and Santa Fe Railway at Isleta also in said county of Bernalillo. The general course and direction of said main line being southerly, east of the east bank of the said river along and under the foot-hills through the city of Albuquerque and the length thereof estimated to be thirty-five miles, more or less, or

otherwise, until the further order of this court; and that you show cause, if any you have, before the judge of the district court of the second judicial district within and for the county of Bernalillo at the court-house in Albuquerque on the 25th day of January, 1898, at ten o'clock in the forenoon, why said injunction should not be continued, and this do you under penalty of the law.

60 Witness the Honorable Jonathan W. Crumpacker, associate justice of the supreme court, of the Territory of New [SEAL.] Mexico, and judge of the second judicial district court thereof, and the seal of said district court, this 17th day of January, A. D. 1898.

HARRY P. OWEN, *Clerk.*

Which said writ of injunction is endorsed:

I, sheriff of Bernalillo county, New Mexico, certify that I have served this order on the within-named Tomas C. Gutierrez, Pedro Griego y Apodaca, Jesus Samora, Benito Jaramillo and Leon Montoya, on the 17th day of January, 1898, at said county of Bernalillo, by then and there delivering a true copy of the same to each of the above-named parties.

T. S. HUBBELL,
Sheriff of Bernalillo Co., N. M.

Fees:

Services	$5.00
Mileage, 12 miles	1.50
Return	.50
	7.00

And afterwards, to wit, on the 4th day of June, A. D. 1898, there was filed and entered of record in the office of the clerk of the district court of the first judicial district, *as* the Territory of New Mexico, within and for the county of Santa Fé, an order setting the time for the hearing of said cause, which said order is in words and figures following, to wit:

In the District Court of the First Judicial District of the Territory of New Mexico, County of Santa Fé.

61 THE ALBUQUERQUE LAND AND IMPROVEMENT Company *vs.* T. C. GUTIERREZ ET AL. } No. 3956.

Upon motion of the attorney for the plaintiff, it is hereby ordered that said cause be set down for trial on Tuesday, the 14th of June, A. D. 1898.

JOHN R. McFIE,
Associate Justice, &c.

And thereafter, to wit, on the 20th day of September, A. D. 1898, there was filed and entered of record in the office of the clerk of the district court, of the first judicial district, of the Territory of New Mexico, within and for the county of Santa Fé, an order for the continuance of said cause, which said order is in words and figures following to wit:

TERRITORY OF NEW MEXICO,
County of Santa Fé.

ALBUQUERQUE LAND AND IRRIGATION COMPANY
vs.
TOMAS C. GUTIERREZ ET AL. } No. 3956.

This cause coming on to be heard, by consent of counsel said cause is hereby continued until the 17th day of October, 1898.

JOHN R. McFIE, *Judge.*

And afterwards, to wit, on the 7th day of October, A. D. 1899, the same being the thirtieth day of a regular term of the district court, of the first judicial district, of the Territory of New Mexico, within and for the county of Santa Fé, the following final decree in the above-entitled cause was had and entered of record, among
62 other proceedings, which said final decree is in words and figures following, to wit:

In the District Court of the First Judicial District of the Territory of New Mexico within and for the County of Santa Fé.

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY,
Plaintiff,
vs.
TOMAS C. GUTIERREZ ET AL., Defendants. } 3956.

and

TOMAS C. GUTIERREZ ET AL., Cross-complainants,
vs.
THE ALBUQUERQUE LAND AND IRRIGATION COMPANY, Cross-defendants.

Judgment.

This cause coming on to be heard upon the complaint of the plaintiff, the answer of the defendants thereto, the cross-complaint of the defendants and the replications of the defendants to the answer and cross-complaint, and the respective parties having appeared by their counsel, N. C. Collier and W. B. Childers, Esqs., on behalf of the plaintiff, and Neill B. Field, Esq., on behalf of the defendants, and said cause having been tried before the court, and argued by counsel for the respective parties, the court having heard the evidence and taken said cause under advisement, after a full consideration thereof, doth find as matters of fact:

I.

That the plaintiff is a corporation and has complied with the provisions of the laws of the Territory of New Mexico. It is organized for the purpose of constructing a canal from a point on
63 the Rio Grande about twenty-eight miles above the city of Albuquerque to the railroad bridge across said Rio Grande, at Isleta, the initial and terminal points of said canal being within the county of Bernalillo.

II.

That the headgate of plaintiff's proposed canal is to be at a point on the Rio Grande three-eighths (⅜) of a mile below or south of the Indian village of San Felipe, about twenty-eight miles above the city of Albuquerque, that the ultimate terminus or point of discharge into the river is at the railroad bridge near Isleta, the entire length of the canal to be about thirty-five (35) miles. The present proposed terminus is at the city of Albuquerque.

III.

That the engineer of the company was proceeding with a survey of the line between Albuquerque and the headgate, when defendants interfered with and obstructed the said engineer in the making of said survey.

IV.

That the capacity of the said proposed canal is two hundred and ten (210) cubic feet of water per second.

V.

That there are at present thirteen ditches taking water from the river between the proposed headgate of plaintiff's canal and Albuquerque, and seven between Albuquerque and the Indian town of Isleta.

VI.

64 That the aggregate capacity of all of the said old ditches is four hundred and ninety-eight (498) cubic feet per second, and the court finds that there has been a valid prior appropriation by the owners of said old ditches of the said four hundred and ninety-eight (498) feet per second of water.

VII.

That during a few months or parts of the summer months of the years 1894, 1895, 1896 and 1897, there was no surplus water flowing in the river at the proposed headgate, but during a large majority of the months of each of these years there was a large amount of surplus water flowing past that point, and that those years were the only years within ten or twenty years in which the river was dry at or above Albuquerque.

VIII.

That in a majority of the last ten years there has been surplus water flowing in the said river at the proposed headgate at all times.

IX.

That the river became dry at Albuquerque about the last of June, 1894, and remained so for twenty-two days, and also in June, 1896, for a number of days, the court being unable to find the exact number or length of time from the evidence.

X.

That the months of June, July, August and September are the "dry season."

XI.

That the planting and growing season in the Rio Grande valley begins in February and ends with October.

65 XII.

That very few farmers served by the present ditches sow wheat, oats, barley or rye, in the fall of *of* the year but do so in the spring, beginning during February or March and that very little, if any, of the water now appropriated is used for these crops after June 15th, but the water is used for chili, corn, alfalfa and melons after that time and for alfalfa as late as October.

XIII.

That for all the months in most years and for most of the months in every year there is a surplus of water flowing in the Rio Grande over and above the amount appropriated by said old ditches.

XIV.

The court finds that there is no evidence that plaintiff relies on any source of water supply than the Rio Grande or that the proposed canal of plaintiff is expected or intended to receive and distribute stored waters.

XV.

That the plaintiff is not the owner of any lands along the line of its proposed canal or elsewhere.

XVI.

That there is no evidence that plaintiff has any contract with or employment by any person who is the owner of lands irrigable from said proposed canal for the conduct of water upon any such lands, or that any owner of lands not now irrigated from existing acequias, desires or intends to irrigate such lands from plaintiff's canal when completed.

66 XVII.

That the proposed canal of the plaintiff will cross and recross the existing acequias of Bernalillo nine times within a distance of one mile of its length.

XVIII.

That some of the defendants and some of their associates are the owners of lands through which the plaintiff proposes to construct its canal.

The court finds as conclusions of laws from the facts found:

I.

That the plaintiff corporation is entitled to exercise the power of eminent domain.

II.

That the plaintiff, by the filing of its articles of incorporation with the secretary of the Territory of New Mexico and complying with the provisions of the act under which it is incorporated, has acquired a right to construct its canal and reservoirs to divert through its proposed canal surplus and unappropriated waters flowing in the Rio Grande and that such a right of eminent domain does not depend upon the ownership of lands by plaintiff or the employment of plaintiff prior to the construction of its canal by owners of lands to carry water for such owners.

III.

That the defendants, at the time of the filing of the complaint herein, unlawfully obstructed the plaintiff in the exercise of
67 powers lawfully conferred upon it by the act under which it is incorporated.

IV.

That the defendants do not and cannot in this action lawfully represent the rights of such persons claiming a right to the use of the waters of the Rio Grande, by prior appropriation, when the appropriation of such persons was effected at a point below the mouth of the proposed canal of plaintiff.

V.

That the defendants cannot lawfully set up in this action any rights secured to them and their associates or their predecessors in title by the treaty of Guadalupe Hidalgo and that the allegations of paragraph ten of the answer of defendants with reference to the treaty rights of defendants — immaterial.

VI.

That the plaintiff is entitled to the relief demanded in the complaint, including a perpetual injunction as prayed for.

VII.

That defendants are not entitled to any part of the relief demanded in their cross-complaint but the same should be dismissed.

Wherefore the court doth order, adjudge and decree that the temporary injunction heretofore granted and continued against the defendants enjoining them from interfering and obstructing and preventing the plaintiff, its agents and servants from entering upon, examining and surveying so much of the lands of the defendants as are necessary for the construction of said canal, and the lawful prosecution of the same, is hereby made perpetual.

68

It is further ordered, and adjudged and decreed that the cross-complaint of defendants be and the same is hereby dismissed, and the plaintiff have and recover of the defendants their costs in this behalf expended, to be taxed and that execution issue therefor.

To which findings and judgment defendants then and there excepted and still except and thereupon the defendants by their counsel moved the court to set aside the foregoing findings and judgment and grant them a new trial for reasons set forth in a motion in writing filed in the cause and the court having seen the said motion and being fully advised of and concerning the same doth overrule said motion, to which defendants excepted and still except and thereupon the defendants by their counsel pray an appeal to the honorable the supreme court of the Territory of New Mexico, which is granted.

JOHN R. McFIE, *Judge.*

And thereupon, to wit, on said 7th day of October, A. D., 1899, there was filed in the office of the clerk of the district court of the first judicial district of the Territory of New Mexico, within and for the county of Santa Fé, a motion for a new trial, which said motion is in words and figures following to wit:

69

In the District Court of the First Judicial District of the Territory of New Mexico within and for the County of Santa Fé.

THE ALBUQUERQUE LAND & IRRIGATION CO., Plaintiff,
vs.
TOMAS C. GUTIERREZ ET AL., Defendants. } 3956.

TOMAS C. GUTIERREZ ET AL., Cross-plaintiffs,
vs.
THE ALBUQUERQUE LAND & IRRIGATION CO., Cross-defendants. } 3956.

Comes now the defendants and cross-plaintiffs by Neill B. Field, their attorney, and move the court to set aside the findings and judgment herein and to grant them a new trial for the following reasons, to wit:

I.

Because the findings of fact are not responsive to all of the issues in the cause.

II.

Because the facts found are not sufficient to support the judgment.

III.

Because the court refused to find material facts which were put in issue by the pleadings and as to which there was evidence.

IV.

Because the court in finding of fact number five attempts
70 to qualify the legal effect of said finding and to leave it open to the plaintiff to question hereafter the validity of the prior appropriation, therein found to have been effected by defendants and cross-plaintiffs and their associates.

V.

Because the conclusions of law are erroneous and are not supported by the facts found.

VI.

Because the court should have concluded as matter of law from facts found that plaintiff is not authorized to exercise the power of eminent domain.

VII.

Because the court should have concluded as matter of law from the facts found that the plaintiff has no right to divert any portion of the waters of the Rio Grande, through the proposed canal.

VIII.

Because the judgment should have been in favor of defendants on the issue in the original case.

IX.

Because the judgment should have been in favor of cross-plaintiffs in the cross-suit.

X.

Because of divers errors and *irregulations* apparent on the face of the record whereby the defendants and cross-plaintiffs were prevented from having a fair and impartial trial.

NEILL B. FIELD,
Attorney for Defendants.

71 And afterwards, to wit, on the 30th day of October, A. D. 1899, there was filed in the office of the clerk of the district court of the first judicial district of the Territory of New Mexico,

within and for the county of Santa Fé, a præcipe for transcript, which said præcipe is in words and figures following, to wit:

TERRITORY OF NEW MEXICO:

Santa Fé District Court.

ALBUQUERQUE LAND AND IRRIGATION COMPANY
vs.
TOMAS C. GUTIERREZ ET AL. } No. 3956.

Præcipe for Transcript for the Supreme Court.

To A. M. Bergere, Esq., clerk of the district court of Santa Fé county.

SIR: The defendants in the above-entitled cause desire to review in the supreme court of the Territory of New Mexico the action of the district court in the following particulars, that is to say:

I.

The granting of the injunction on the original complaint.

II.

The sufficiency of the facts found to support the judgment rendered.

III.

The correctness of the district court's conclusions of law based upon the facts found.

IV.

The judgment in favor of plaintiff.

72

V.

The refusal of the court to render judgment in favor of cross-plaintiffs on their cross-complaint.

VI.

The refusal of the court to find upon all the issues of fact raised by the pleadings.

VII.

The refusal of the court to dismiss the complaint.

You are further notified that the defendants deem only a part of the record in this cause necessary to the review of the questions enumerated and you are therefore required to make up a transcript for the supreme court to consist of the following:

I.

The complaint and Exhibit "A" thereto.

II.

The answer and cross-complaint.

III.

The answer of the plaintiff to new matter contained in answer of the defendants.

IV.

The reply of the cross-plaintiffs to the answer of the cross-defendants.

V.

The original injunction issued.

VI.

All of the record entries in said cause both in the Bernalillo district court and the district court of Santa Fè county.

73 VII.

The judgment.

VIII.

The motion to set aside judgment and for a new trial.

IX.

This præcipe.

All other papers not herein enumerated are to be by you omitted from your transcript and you will certify to the transcript to be made in accordance with the requirements of this præcipe.

NEILL B. FIELD,
Attorney for Defendants.

TERRITORY OF NEW MEXICO, }
First Judicial District, County of Santa Fé. }

I, A. M. Berger, clerk of the district court of the first judicial district, of the Territory of New Mexico, in and for the county of Santa Fé, do hereby certify that the foregoing sixty-six (66), pages, this page included, contain a true, correct and complete transcript of so much of the record and files of my said office as is specified in the defendants' præcipe in a certain cause lately pending in said district court wherein The Albuquerque Land and Irrigation Company is plaintiff, and Tomas C. Gutierrez, *et al.*, are defendants.

In witness whereof I have hereunto set my hand, and
[SEAL.] affixed the seal of said district court, this 16th day of November, A. D. 1899.

A. M. BERGERE,
Clerk of said District Court.

74 And afterwards, to wit, on the 7th day of December, there was filed in the office of the said clerk of the said supreme court, an assignment of errors, which said assignment of errors, was and is in words as follows, to wit:

In the Supreme Court of the Territory of New Mexico, January Term A. D., 1900.

ALBUQUERQUE LAND & IRRIGATION COMPANY, Appellee,
vs.
TOMAS C. GUTIERRES, PEDRO GRIEGO Y APODACA, JESUS Zamora, Benito Jaramillo, and Leon Montaya, Appellants. } No. 858.

Assignment of Errors.

Come now the said appellants, and show to the court here that in the record, proceedings and judgment of the district court in the above-entitled cause there is manifest error to the prejudice of these appellants, in this, to wit:

I.

The court erred in granting the injunction on the original complaint.

II.

The court erred in rendering judgment in favor of the appellee on the facts found because the said facts were insufficient to support the said judgment.

III.

The court erred in refusing to find material facts which were put in issue by the pleadings.

75

IV.

The court erred in refusing to adjudge as matter of law from the facts found that the appellee is not authorized to exercise the power of eminent domain.

V.

The court erred in its conclusion of law No. 2, as follows: "That the plaintiff, by the filing of its articles of incorporation with the secretary of the Territory of New Mexico and complying with the provisions of the act under which it is incorporated, has acquired a right to construct its canal and reservoirs to divert through its proposed canal surplus and unappropriated waters flowing in the Rio Grande and that such right of eminent domain does not depend upon the ownership of lands by plaintiff or the employment of plaintiff prior to the construction of its canal by owners of lands to carry water for such owners."

VI.

The court erred in its conclusion of law number 3, as follows: "That the defendants, at the time of the filing of the complaint herein, unlawfully obstructed the plaintiff in the exercise of powers lawfully conferred upon it by the act under which it is incorporated."

VII.

The court erred in its conclusion of law number 4, as follows: "That the defendants do not and cannot in this action lawfully represent the rights of such persons claiming a right to the use of the waters of the Rio Grande, by prior appropriation, when the appropriation of such persons was effected at a point below the mouth of the proposed canal of plaintiff."

VIII.

The court erred in its conclusion of law number 5, as follows: "That the defendants cannot lawfully set up in this action any rights secured to them and their associates or their predecessors in title by the treaty of Guadalupe Hidalgo and that the allega-
76 tions of paragraph ten of the answer of defendants with reference to the treaty rights of defendants are immaterial."

IX.

The court erred in refusing to dismiss the complaint.

X.

The court erred in refusing to grant the appellants the relief demanded in their cross-complaint.

Wherefore the said appellants, pray that the said record may be seen and examined by this honorable court; that the errors of the said district court may be corrected, its judgment annul-ed and that these appellants may be restored to all things which they have lost by reason thereof.

NEILL B. FIELD,
Attorney for Appellants.

And afterwards, on to wit: at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, the seat of government, on the first Wednesday after the first Monday in January, the same being Wednesday the 3rd day of January, A. D. 1900 on the thirty-third day thereof, the same being Friday February 9th, A. D. 1900, the following among other proceedings, were had, as follows, to wit:

TOMAS C. GUTIERREZ ET AL., Appellants, *vs.* ALBUQUERQUE LAND & IRRIGATION CO., Appellee.	No. 858. Appeal from District Court, Santa Fé County, on Change of Venue from Bernalillo County.

This cause coming on to be heard upon the transcript of record, assignment of errors, and briefs of counsel, was argued by Neill B. Field, Esq., for appellants, and W. B. Childers, Esq., for
77 appellees, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, to wit on the thirty-seventh day of said regular term, of the said supreme court, the same being Tuesday the 3rd day of May, A. D., 1900, the following among other proceedings were had, as follows, to wit:

TOMAS C. GUTIERRES ET AL., Appellants, vs. ALBUQUERQUE LAND & IRRIGATION Co., Appellee.	No. 858. Appeal from District Court, Santa Fé County, on Change of Venue from Bernalillo County.

This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the present term, the court being now sufficiently advised in the premises, announces its decision by Chief Justice Mills, Associate Justices Parker and Leland concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file. It is therefore considered and adjudged by the court that the judgment of the district court in and for the county of Santa Fé, whence this cause came into this court, be, and the same is hereby affirmed, and that in accordance therewith, the injunction heretofore granted against the appellants, by the said district court, is hereby affirmed and made perpetual, and the cross-complaint of the appellants against the appellee is dismissed and that the appellee, The Albuquerque Land & Irrigation Company, do have and recover of and from the appellants, its costs in this behalf expended as well in this court as in the court below, to be taxed, and that it may have execution therefor.

And afterwards to wit: on the thirty-seventh day of said regular term, the same being Tuesday, the 3rd day of May,
78 A. D. 1900, the following among other proceedings were had as follows, to wit:

TOMAS C. GUTIERRES ET AL., Appellants, vs. ALBUQUERQUE LAND & IRRIGATION Co., Appellee.	No. 858. Appeal from District Court, Santa Fé County, on Change of Venue from Bernalillo County.

Now comes Neill B. Field, attorney for appellants in the above-entitled cause and prays an appeal to the honorable the Supreme Court of the United States, and moves the court to find the facts in said cause in accordance with the requirements of the act of Congress in such cases made and provided and the court being sufficiently advised in the premises, thereupon orders that the said appeal be, and the same hereby is granted, and it is ordered to be certified to the Supreme Court of the United States, that this court adopts as its own the findings of fact made by the judge of the district court at the time of the rendition of the judgment in this case as the same are set forth at large in the transcript.

And afterwards, to wit, on the 3rd day of May, A. D. 1900, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, the opinion of the court, which said opinion of the court, is in words and figures, as follows, to wit:

79 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1900.

THE ALBUQUERQUE LAND & IRRIGATION Co., Appellee,
vs.
TOMAS C. GUTIERREZ ET ALS., Appellant-.

No. 858. Appeal from District Court, Santa Fé County.

Appeal from the first judicial district court, on change of venue from the district court of the second judicial district, for the county of Bernalillo.

Childers & Dobson, attorneys for appellee.
Neill B. Field, Esq. attor*b*ey for appellants.

Opinion of the Court.

The facts necessary to an understanding of this case are fully stated in the able opinion rendered by the court below, which is a part of the record in this case, and it is not necessary to restate them here.

Two questions are to be determined in this case, first, can a company be lawfully incorporated under chapter XII of the Acts of 1887, (sections 468–493 Compiled Laws of 1897,), go upon the lands of private persons for the purpose of making a preliminary survey, and acquire the right of way through such lands by the exercise of the right of eminent domain under the terms of said act, unless it is shown that there is a surplus of water in the stream from which it is proposed to divert water unappropriated and subject to diversion and appropriation? Second, can the company organized under such act exercise the powers granted thereby, unless it is itself the owner of the lands to be irrigated by the water to be so diverted, or have been previously employed by the owners of such land to divert water for their use?

As to the first proposition, it is sufficient to say that the court below has found as a fact that there is a surplus of water in the Rio Grande subject to appropriation, and that from said river the
80 appel-ees proposed to divert, carry and distribute the same. There is ample evidence to sustain the findings of the court below, and it is a well-settled proposition that this court cannot disturb such findings.

It is undoubtedly true that the diversion and distribution of water for irrigation and other domestic purposes in New Mexico, and other Western States where irrigation is necessary, is a public purpose. This has been held by the Supreme Court of the United States in the case of Fallbrook Irrigation District *vs.* Bradley, 164 U. S., 112. It seems to us to be equally well settled that it is not necessary that

the company diverting, carrying, delivering and distributing water for such purpose shall be itself a consumer, provided that the water when so carried and distributed shall within a reasonable time be applied to a beneficial use. The able opinion of the court below discusses these propositions so fully, that we adopt its opinion and make it the opinion of this court, as follows:

81 This cause was brought into this court by change of venue from the county of Bernalillo and has been submitted upon bill, answer and replication; cross-bill, answer and replication; oral and documentary evidence, and arguments of counsel.

To avoid unnecessary repetition, let it be understood that wherever the word complainant or plaintiff is used it means cross-defendant as well, and wherever defendant is used it means cross-plaintiff or complainant as well, as the issues joined are embodied in both the original and cross suit and they will be considered together.

The proceedings had in these causes before his honor Judge Crumpacker, presiding judge of the second judicial district, have restricted somewhat the issues before this court, inasmuch as this court will not presume to review the action of the court of the second judicial district, whose jurisdiction is co-extensive with that of this court.

The following proceedings were had in the second judicial district court before the venue was changed to this court. Temporary injunction was granted upon complainant's bill, January 17, 1898, and the defendants were ordered to show cause why the injunction should not be continued on the 25th day of January, 1898.

Defendants filed answer, cross-complaint and affidavits, January 25th, 1898, and the cause was heard by the court and taken under advisement.

On the 8th day of February, 1898, the court rendered his opinion in favor of the complainant in the bill, and entered an order continuing the injunction in force against the defendants until

82 the further order of the court, and denying the injunction prayed for by the defendants in their cross-bill.

On the 19th day of February, 1898, the plaintiff in the original bill filed demurrer to the answer and cross-complaint of the defendants, but upon hearing, the court overruled the demurrer by an order entered March 12, 1898. The cross-defendants filed answer to the cross-complaint, March 14, 1898, and the necessary replications being filed, the issues were fully made up on the complaint and cross-complaint.

On the 18th of May, affidavit and motion for change of venue was filed, and upon the same day objections were filed to the granting of the motion, but the court sustained the motion and ordered the venue changed to the first judicial district.

It will thus be seen that before the cause came into this court, his honor, Judge Crumpacker, had not only granted the injunction prayed for in the original bill, but ordered same continued in force until further order of the court; that the injunction prayed for by the defendants in their cross-bill had been denied; and that the demurrer of the complainants to the new matter in the answer of the defendants and to their cross-complaint had been overruled. There-

fore, all these matters have been eliminated and will not be reviewed here. The entire case is before this court on its merits, but the sole question to be determined is, whether or not upon the pleadings and proofs now before the court, either of the parties are entitled to a perpetual injunction, and if so, which. To determine this, the court must decide whether or not the Albuquerque Land and Irrigation Company have a legal right to construct canals, ditches or pipe lines authorized by their charter, and whether
83 or not they have the right to enter upon, examine and survey, and which practically involves the right to condemn and excavate, so much of the land of private owners along the line of their proposed canals or ditches as may be necessary for such purpose.

If complainants have this right under the law, then it follows that the defendants had no legal right to interfere with or obstruct them in the pursuit of this lawful purpose. On the other hand, if the complainant had not such a legal right, the cross-complainants had a right to prevent the company from attempting to exercise the right of eminent domain upon their lands along the proposed canal. Many questions are suggested by the pleadings that I do not deem it necessary or proper to consider in determining this case, indeed, the proofs are not sufficiently specific to enable the court to do so. I apprehend that the sole reason why the court of the second judicial district did not award the complainants a perpetual writ of injunction was because the court was of the opinion that the main question in the case, viz., whether or not there was surplus water in the river that the complainants would have a right to conduct through their proposed canal, for the purpose of irrigation or for some other beneficial use, should be determined upon proof and not upon bill, answer and affidavits.

That counsel on both sides so understood the issue is plain from the nature of the oral and documentary evidence taken at the hearing. The evidence taken on behalf of the complainant tended to prove that there was surplus water in the Rio Grande at the point where the proposed canal was to be taken out, and the evidence taken on the part of the defendants, to show that all of the
84 water of the river had been appropriated and that there was no surplus water. Of course, there was some proof as to other matters, but this was the main controversy as shown by the evidence. Furthermore, in my opinion, the nature of the case, as well as the law applicable thereto, makes the matter of surplus water the controlling question.

In 1887 the legislature of this Territory passed an act providing for the formation of companies for the purpose of constructing irrigation and other canals, and the improvement and colonization of lands. Section 1 of chapter 12, Laws of 1887, is as follows:

"Any five persons who may desire to form a company for the purpose of constructing and maintaining reservoirs and canals, or ditches and pipe lines, for the purpose of irrigation, mining, manufacturing, domestic and other public uses, including cities and towns, and for the purpose of colonization and improvement of lands in

connection therewith; for either or both of said objects, either jointly or separately, shall make and sign articles of incorporation, which shall be acknowledged before the secretary of the Territory, or some other person authorized by law to take the acknowledgment of conveyances of real estate, and when so acknowledged such articles shall be filed with such secretary."

That the complainant company was incorporated under this act is admitted by the defendants in their answer. Section 2 provides in paragraph 2 that:

"The purpose or purposes for which said company is formed, and if the object be to construct reservoirs and canals or ditches and pipe lines for any of the purposes herein specified; the beginning point and terminus of the main line of such canals and ditches and pipe lines; and the general course, direction and length thereof shall be stated."

The articles of incorporation of the complainant company provide:

85 "The purpose for which said company is formed and created a body politic and corporate is to build, construct and maintain reservoirs and feeders therefor, canals, ditches, pipe lines, flumes and such branch lateral and side canals, pipe lines, ditches and flumes as may be necessary for the supplying of water for the purpose of irrigation and the improvement and colonization of lands in connection with such irrigation; and to acquire, purchase, lease and sell water, water rights, reservoirs, canals, ditches, pipe lines, flumes and lands in the furtherance of said purpose."

Section 3 of said article fixes the beginning point, course, direction, distance and terminus of their proposed canal, as required by law. From an examination of the law referred to and the articles of incorporation just quoted, it seems clear that the complainant company has brought itself within the terms of the law and is therefore entitled to the benefits, and to exercise all the powers conferred by the act.

The legislature which passed the act is charged with a knowledge of the community ditch system of the Territory, and its benefits and defects. In enacting the law under consideration it was manifestly the intention of the legislature, while preserving the present system and the rights of parties under it, to provide for a more modern and improved system of irrigation in the future, wherever it was desired and did not interfere with prior rights. That improved methods of storing and conducting water by means of reservoirs, canals, ditches and pipe lines, may be constructed and operated, the right of eminent domain is fully given by the act in the following language:

CHAPTER 12, SECTION 17. "Corporations formed under this
86 act for the purpose of furnishing and supplying water for any of the purposes mentioned in section one, shall have, in addition to the powers hereinbefore mentioned, rights as follows:

1. "To cause such examinations and surveys for their proposed reservoirs, canals, pipe lines and ditches to be made, as may be necessary to the selection of the most eligible locations and advan-

tageous routes, and for such purpose, by their officers, agents and servants to enter upon the lands or water of any person, or of this Territory.

2. "To take and hold such voluntary grant of real estate and other property, as shall be made to them in furtherance of the purposes of such corporation.

3. "To construct their canals, pipe lines or ditches upon or along any stream of water.

4. "To take and divert from any stream, lake or spring the surplus water, for the purpose of supplying the same to persons, to be used for the objects mentioned in section one of this act, but such corporation shall have no right to interfere with the rights of, or appropriate the property of any person except upon the payment of the assessed value thereof, to be ascertained as in this act provided: And, provided, further: That no water shall be diverted, if it will interfere with the reasonable requirements of any person or persons using or requiring the same, when so dive-ted.

5. "To furnish water for the purpises mentioned in section one, at such rates as the by-laws may prescribe; but equal rates shall be conceded to each class of consumers.

6. "To enter upon and condemn and appropriate any lands, timber, stone, garvel, or other material that may be necessary for the uses and purposes of said companies."

It is difficult to see how the legislature could have conferred more complete powers upon such companies than it did by that act, and that the legislature has power to enact a law granting the
87 right of eminent domain is settled, provided the property taken is for a public purpose.

That lands condemned and used for the right of way of reservoirs, canals, ditches and pipe lines, for the purposes specified in the act above referred to, are for a public purpose, is too plain to require extended discussion. Congress has liberally granted this right over the public domain for the purpose of the construction of railroads and for other public uses, and State and territorial legislatures have granted this right for purposes of irrigation, railroads, public roads and for other purposes. In arid regions the construction of systems of reservoirs, canals and ditches for the use of the public in irrigating lands, is certainly as much for a public purpose as railroads or public roads, and authority to exercise the right of eminent domain is even more of a necessity than for such purposes.

Broder *vs.* Mining Co., 101 U. S., 274.
Fallbrooks Irrigation District *vs.* Bradley, 164 U. S., 112.
Bridal Veil Lumbering Co. *vs.* Johnson, 46 Pac., 790.
14 Lawyers' Annotated Reports, page 762.
Oury *vs.* Goodwin, 26 Pac., 377.

The legislature of this Territory, however, placed a specific limitation upon the exercise of the right of public domain, by the use of the following language: "To take and divert from any stream, lake or spring, the surplus water." Section 17, subsection 4.

If, therefore, the complainant company proposed to divert water,

and obtain a supply for its canal from the Rio Grande alone, under the above section its power to exercise the right of eminent
88 domain would be subject to its ability to show that there was surplus water in said stream, and for that purpose the burden of proof is upon the complainant, as the court has shown.

Now, what is surplus water? Surplus water, for the purposes of this case, is water which has not been diverted and applied to a beneficial use prior to the filing of complainant's bill. To state the proposition another way: Surplus water is all water running in the Rio Grande not subject to a valid prior appropriation.

Defendants' contention that there is no such thing as private ownership in the waters of the streams of this Territory is undoubtedly correct. All the right obtainable in the water of the public streams of the Territory is the right to appropriate so much thereof as is actually used for some beneficial or legal purpose. This appropriation may become a vested right by continuous use, or it may be lost by non-use, and in this the right differs from private ownership.

The doctrine of the common law no longer obtains in what is known as the arid and mountainous region of the West, and the doctrine of prior appropriation has been substituted for the common law as a matter of necessity, on account of the peculiar conditions existing in most, if not all, the mountain States and Territories.

In the case of United States *vs.* The Rio Grande Dam & Irrigation Co. (a case decided May 22, 1899) the Supreme Court of the United States discusses the law of water rights and refers to the laws of Congress on the subject, as follows:

"Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although
89 there has been in all the Western States an adoption of recognition of the common law, it was early developed in their history that the mining industry in certain States, the reclamation of arid lands in others, compelled a departure from the common-law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those States, by custom and by State legislation, a different rule—a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes. So far as these rules have only a local significance, and affect only questions between citizens of the local Federal courts. In 1863 Congress passed the following act (14 Stat. 253; Rev. Stat. 2339):

"'Whenever, by priority of possession, right to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person in the construction of any ditch

or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.'"

* * * * * * *

In 1887 an act was passed for the sale of desert lands, which contained in its first section this proviso (19 Stat., 377):

"Provided, however, that the right to the use of water by the persons so conducting the same on or to any tract of desert land of 640 acres shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of lakes, rivers and other
90 sources of water supply upon the public lands and not navigable, shall remain and be held free for appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

On March 3, 1891, an act was passed repealing a prior act in respect to timber culture, the eighteenth section of which provided (26 Stat., 1101):

"'That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which may have filed, or may hereafter file, with the Secretary of the Interior, a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and 50 feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth and stone necessary for the construction of such canal or ditch; provided, that no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation, and the privilege of water for irrigation and other purposes under the authority of the respective States and Territories.'"

This extended quotation from the most recent statement of the doctrine from that court will obviate the necessity of citing other cases.

Water is declared free in the public streams of the State of Colorado, by express provision of the constitution of that State, and the courts of that State apply the doctrine of prior appropriation in determining its water rights. The decisions of the courts of Colorado are, therefore, very instructive in similar litigation in this
91 Territory, inasmuch as the legislature of this Territory in 1876 declared that "All currents and sources of water flowing from the natural sources in the Territory of New Mexico, shall be and they are by this act declared free." Section 52, Compiled Laws of 1897.

The doctrine of prior appropriation is the law governing water rights in this Territory, and to constitute a valid prior appropriation of the water of the Rio Grande two things must be established.

1. There must be a rightful diversion.

2. An application to some beneficial use.

And neither of these is sufficient without the other. It is not essential that the water shall be used by the person or corporation diverting the water from the stream, for the law is well settled that water may be diverted from the streams by canals and ditches owned by individuals or corporations, and conducted long distances and beneficially used by others. This is fully established by the large canal and ditch systems existing in California, Colorado, Arizona and many other States. In such cases the beneficial user is held to have constituted the ditch or canal company his agent to divert and conduct water for his use, and the Latin maxim, *Qui facit per alium, facit per se*, seems to apply in such cases.

I see no reason, therefore, why such reservoir, canal and ditch companies as are authorized by the laws of the Territory should not be allowed to perform services in connection with the irrigation of lands in this Territory similar to those performed by such corporations in other States and territories where the same law, as to water rights, prevails. I can see no legal reason for preventing them from exercising the power conferred upon such companies by the statute, provided there is surplus water subject to appro-
92 priation through the agency of such company.

To determine whether or not there was any surplus water in the Rio Grande, subject to appropriation and use by complainant's proposed canal or ditch, it becomes necessary to ascertain from the evidence how much of the waters of that stream had been legally diverted and used for a beneficial purpose prior to the inception of plaintiff's rights.

I find, from the evidence, that the headgate of complainant's proposed canal is to be at a point on the Rio Grande three-eight-s (⅜) of a mile below or south of the Indian village of San Felipe, about 28 miles above the city of Albuquerque; that the terminus or point of discharge into the river is at the railroad bridge near Isleta, the entire length of the canal to be about 35 miles; the present proposed terminus is at the city of Albuquerque; that the engineer of the company, Mr. Harroun, was proceeding with a survey of the line between Albuquerque and the headgate when the interference of the defendants occurred, which led to the legal proceedings in which injunction issued as above referred to. The capacity of the canal I find to be 210 cubic feet of water per second.

There is controversy as to the number of ditches on either side of the river between the proposed headgate of the proposed canal and Albuquerque, and also from Albuquerque to the terminus. All of the witnesses agree that there are at least ten acequias taking water from the river between the proposed headgate and Albuquerque on the east side, and at least three upon the west side. There are seven ditches heading below Albuquerque, down to Isleta, as shown
93 by Mr. Follett's report, and all upon the west side of the river.

The capacity of these ditches must be ascertained from the testimony of Mr. Harroun, and Mr. Follett's report, as none of the other witnesses testify upon this point.

Mr. Harroun, and Mr. Follett's report practically agree that the 10 ditches on the east side of the river above Albuquerque have a capacity of 180 cubic feet per second, and that the three ditches on the west side above the city have a capacity of 45 cubic feet per second. Mr. Follett's report alone gives the capacity of the ditches between the city and Isleta, and from this we find their capacity to be 273 cubic feet per second. Thus I find that the capacity of all the old ditches along the route of the proposed canal to have been 498 cubic feet per second, and this amount of the water of the Rio Grande was legally diverted by the old ditches prior to the existence of any rights of the complainant.

The proof as to whether or not this entire amount was used for a beneficial purpose is not sufficiently specific to enable the court to find that it was not. Mr. Harroun is of the opinion that about one-half of the water diverted by the old ditches is wasted, and while the court has no doubt that a large portion of the water thus diverted is wasted, still the proof is too general to warrant the court in holding that any specific part is wasted and not applied to a beneficial use. For the purposes of this case, therefore, I feel compelled to hold that there has been a prior appropriation of the water of the Rio Grande to the extent of the capacity of the ditches above referred to, but the court realizes that this is a very uncertain conclusion, as the testimony of Mr. Harroun is, that there are
94 about 1,800 acres of swamp and meadow lands made thus by the waste waters from the old ditches. However, as this is not a final determination of this question, except for the purposes of this inquiry, it is the duty of the court to overestimate rather than underestimate the quantity of water appropriated, that prior rights may be fully protected, in view of the uncertainty of the evidence on this point.

Turning now to the flow of water in the river at the point where the headgate of the proposed canal is to be located, I find the most reliable evidence to be that of Mr. Harroun, and the data submitted in connection with his testimony, inasmuch as his personal researches and investigations have been much greater than that of the other witnesses, and being a competent civil engineer, his means of knowledge is much better than that of other witnesses. Indeed, he is the only witness on either side who attempts to testify as to the amount of water flowing in the Rio Grande, in any specific manner. The other witnesses testify that the river was dry at certain times, and give their opinion as to whether or not there was any surplus during the dry season, but none of them attempts to testify as to the amount of water flowing in the stream. Mr. Follett's report as to this matter is based largely upon data furnished by Mr. Harroun, as the report states, and as to certain dates and places, agrees with the testimony and data of Mr. Harroun, but Mr. Harroun testifies much more fully and submits data made upon more extensive and reliable investigation than that upon which the

Follett report is based, and is, therefore, more satisfactory. These measurements are only approximately correct, it is true, but they are the best obtainable evidence and are superior to the evi-
95 dence not based upon measurements.

In regard to the flow of water in the Rio Grande at Embudo, Rio Grande and San Marcial for the years 1895, 1890 and 1897, Mr. Harroun testifies that:

"In 1895 the flow at Embudo aggregated 885,279 acre feet. That flow may be taken as the flow of San Marcial. The flow at Rio Grande during the same year was 1,392,507; there was an increase between these two points of 57 per cent.

"Between Embudo and San Marcial?

"A. Yes, sir; 57 per cent. in 1895, between these two points. In 1896, the flow at Embudo was 467,960 acre feet.

"What was it at San Marcial?

"A. There is no record made for 1896; no record whatever; although the gage heights are kept continually the channel is so shifting that with the few measurements that were made during that year no careful conclusions can be drawn from the gage heights; but in 1896, the flow at Embudo was 467,960 acre feet with an increase of 47 per cent. between that and Rio Grande, which was 698,072 acre feet; the flow at San Marcial during 1896 was 566,499, or a loss between these two points of only 19 per cent.; in 1897, the Embudo flow was 1,112,382 acre feet, and Rio Grande, 1,909,060 acre feet, showing an increase between these two points of 71 per cent.; the flow at San Marcial was 2,331,586 acre feet, an increase of 22 per cent. between these two points.

"Q. Explain what you mean by acre feet?

"A. An acre foot is the amount covering one acre one foot, 43,560 cubic feet equal to about one acre foot in every 24 hours.

"Q. I will ask you to state if you have the data from which you can give the flow at these points in the months beginning with February and ending with October in each year of these years?

"A. Yes, sir; at Embudo the mean flow in 1895, during the month of February, was 503 cubic feet a second; in March,
96 759; April, 2,541; May, 2,679; May, 2,679; June, 3,021; July, 1,335; August, 1,080; September, 636; and October, 494.

"Q. In 1895?

"A. Yes, sir. At Rio Grande the same year, the flow in February was 591, this is the mean flow for the month; March, 1,371; April, 5,075; May, 4,411; June, 4,630; July, 1,768, August, 1,481; September, 722; October, 707; there is no record of San Marcial during 1895. In 1896, at Embudo, the mean February flow was 551; March, 957; April, 17,797; May, 1,598; June, 367; July, 299; August, 249; September, 222; October, 349; for 1896, at Rio Grande, there is no record from March 4th to March 31st; the first three days of March giving a mean flow of 1,355 second feet; for April, 3,483; May, 2,704; June, 535; July, 412; August, 243; September, 299, and October, 461: for 1896, at San Marcial the mean flow for February was 680; March, 679; April, 3,142; May, 2,019; June,

466; August, 1,181; September, 130; October, 742. In 1897, at Embudo, the flow in cubic feet per second was, for February, 407; March, 561; April, 1,691; May, 5,443; June, 4,596; July, 1,248; August, 388; September, 344, and October, 1,535; at Rio Grande for the same year, the flow was for February, 541; March, 985; April, 5,056; May, 11,454; June 6,153; July, 1,580; August, 458; September, 650; October, 2,227; for San Marcial during the same months, the flow for February was, 434; March, 660; April, 3,584; May, 12,173; June, 6,156; July, 1,117; August, 101; September, 1,907; October, 4,019; as I have said before the record for 1898 is not concluded; that is the mean flow for the months mentioned.

"Q. Now explain what you mean by mean flow?

"A. The mean flow as there noted, is the sum of the acre feet per day divided by the number of days in the month, the sum of the acre feet and the number of feet per second divided by the number of days in the month.

"*Q.* I want to get the flow in each month, for a given day in each month, for the months of May, June, July and August, of each of the years from which points your observations were taken nearest to this ditch.

97 "A. The nearest station is at Rio Grande; the flow for April was 1,610 cubic feet per second; these are all figures in cubic feet per second; in May, 2,240; June, 1,120; July, 1,005; August, 705; September, 530. In 1896 the mean flow for April was 1,265; May, 255; June, 255; July, 210; August, 255; September, 350. For 1897 the mean flow for April was 10,200; May, 8,800; June, 2,486; July, 200; August, 240; and September, 360.

"Q. How far is this Rio Grande station from the proposed headgate of this plaintiff's canal?

"A. It is about 35 miles."

Mr. Follett's report shows the following flow at Rio Grande station for the years 1895 and 1896: Summer flow in second feet in 1895—April, 5,070; May, 4,615; June, 4,630; July, 1,170; August, 1,480; September, 720. In 1896—April, 3,480; May, 2,710; June, 580; July, 440; August, 195; September, 590. Winter flow for same years at same station: October, 705; November, 835; December, 710; January, 760; February, 790; March, 1,370.

Rio Grande station is selected for illustration because it is the nearest station, where measurements were taken yearly, to the headgate of the proposed canal, thirty-five (35) miles, and Mr. Harroun further testifies that the flow at the headgate was substantially the same as at Rio Grande station for the reason that there are tributaries between those points supplying a sufficient amount of water to equal the loss from seepage and evaporation.

From this testimony I find, as a fact, that while during a few months, or parts of the summer months, of the years 1894, 1895, 1896 and 1897, there was no surplus water flowing in the river at the proposed headgate, during a large majority of the months of each of these years there was a large amount of surplus water flowing

98 past that point. All of the witnesses testify that the years 1894, 1895 and 1896 were the dryest years known, some say

for 10 and others for 20 years, and the only years in which the river was dry at or above Albuquerque.

I also find, as a fact, that in a majority of the last ten years there has been surplus water flowing in the river at the prop-sed headgate at all times, as witnesses, some of whom were mayordomos of those ditches, testify there was no scarcity during those years.

I further find, as a fact, that the river became dry at Albuquerque about the last of June and remained so, as most of the witnesses testify, for 22 days in 1894, and also in July, 1896, the number of days cannot be definitely stated from the evidence. Mr. Follett's report states that the river was dry at Albuquerque through July, 1895, but Mr. Follett doubts this, and it would seem clear that it was not, as Mr. Follett's report states that there was "water all summer" in the river at Los Lunas. I find as a fact that the irrigation season begins in February and ends in October.

I find, as a fact, that the months of June, July, August and September, are considered the dry season, and I further find that what is known as the rainy season occurs during these months, also, so that it is possible for the dry season to become the wet season and the anomaly may be explained by stating that the term "dry season" refers to the water in the river rather than the rainfall.

I find, as a fact, that very few farmers, served by the present ditches, sow wheat, oats, barley or rye in the fall of the year, but do so in the spring, beginning during February or March; and I further find that very little, if any, of the water now appro-
99 priated is used for those crops after July 1st, in fact, very little is used for those crops after June 15th, but water is used for chile, corn, alfalfa and melons after that time, and for alfalfa as late as October. It appears, therefore, that less of the water diverted by the present ditches it used after the first of July, than is used before that date when the grain crops and all others are growing.

The witnesses for the defense were asked the following question, "From your knowledge of the existing system of community ditches and of the Rio Grande, is there, or is there not, any surplus of water in the Rio Grande in that vicinity during the dry season?" The answer was that there was no surplus.

As has been stated, there was also testimony that the river was dry in 1894 and 1896 at different dates during the dry season. It will be observed that this testimony is confined, especially, to the dry season. This period includes June, July, August and September, but as a matter of fact there is usually a large surplus in June, and frequently in September, also.

The limitation to the dry season makes the testimony immaterial, because if there was surplus water flowing in the river there at any time it was subject to diversion and use, and being surplus and unappropriated water there can be no injury done to any prior appropriator; the law will protect him in the use of the water actually appropriated. Sec. 17 of chap. 12, grants the right of eminent domain to companies utilizing surplus waters for certain beneficial purposes, and the use of the word surplus would indicate that the legislature had in mind streams whose waters had been in part

appropriated. If there is surplus and unappropriated water
100 in the stream, companies have a right to organize and exercise the powers conferred upon them by the statute and this right is not dependent upon a contingency such as the possible failure of the water supply during a few months of exceptional years.

The court takes judicial notice of the fact that from October until about the first of March in each year there is very little water used for any purpose by the farmers in the valley of the Rio Grande, and as a matter of law, it is not an invasion of his rights for a subsequent appropiator to use water after a prior appropriator has ceased to do so.

I am unable to ascertain the acreage in cultivation, except from the testimony of Mr. Harroun, as the other witnesses do not know and do not attempt to state it. Mr. Harroun says there are probably 12,000 acres there, subject to irrigation, but that only about 3,200 acres are served by the present ditches, and this is the extent of the present cultivation; and he further says that at least 7,000 additional acres could be served by the proposed canal if a supply of water equal to the capacity of the canal can be obtained.

The witnesses on behalf of the defendants testified that they did not know of any beneficial use to which complainants could put the water in the event of the construction of the proposed canal. Such evidence is not of much value in view of the testimony that there are 7,000 acres of irrigable land which the present ditches are unable to serve. If any part of this additional acreage could be brought under cultivation by means of the canal it would be a beneficial purpose within the meaning of the statute. It is evident that these witnesses so testified from a belief that there is no surplus water, or, that the present method of irrigating and cultivat-
101 ing lands cannot be imporved. I am of the opinion that the premises *is* wrong in either case and their conclusions necessarily wrong.

The court has found that there is surplus water in the Rio Grande during a majority of the months of every year, and is equally satisfied that the present system of both irrigating and cultivating lands in this Territory can be greatly improved by the adoption of more modern methods of storing and conducting water upon the lands, and a more economical use of it when so conducted. Mr. Follett's report shows that many of the present ditches were in use 100 years ago, and it would seem strange that a system one hundred old could not be improved upon.

I do not underestimate the present ditch system, for in some respects it is very good and so long as it is in existence its status and rights must be upheld by the courts; but that it is not an economical system, that it has no provision for storing water, and that there is an equal distribution of the water, is within the knowledge of this court, and is shown by the testimony.

The suggestion that the water cannot be used for a beneficial purpose during the six months when it is not used by the ordinary farmer I cannot accept. Mr. Blucher testifies that he uses water all

the year in his market gardening, and in view of the provision of the statute, and of complainant's charter, the court would not be warranted in holding that the water cannot be applied to some of the purposes declared to be a beneficial use by the statute.

The right of eminent domain may be exercised by corporations organized under chapter 12, Laws of 1887, in constructing
102 reservoirs, canals, ditches and pipe lines for the purpose of conveying surplus water for irrigation, manufacturing or mining purposes, and the exercise of this right is not dependent upon the ownership of lands by the company or contracts with customers for the use of water. These considerations may be important when the actual diversion of the water through the canal is attempted, but for the purpose of constructing the system the existence of surplus water is the controlling consideration. These companies are quasi-public servants, and their existence is authorized by law.

In Wheeler *vs.* Irrigation Co., 17 Pac., 487, the supreme court of Colorado says that such a canal is a "quasi-public servant. It exists largely for the benefit of others, being engaged in the business of transporting for hire water owned by the public to the people owning the right to its use. It is permitted to acquire certain rights as against those subsequently diverting water from the same stream. It may exercise the right of eminent domain."

In Coombs *vs.* Ditch Company, another Colorado case, it was held that an owner of land along the line of the ditch could compel the company to supply him with water; 28 Pac., 966.

In Broder *vs.* Mining Company, 101 U. S., 274, it was held that the rights of such companies "are rights which the Government had recognized and encouraged and was bound to protect."

In Ditch Company *vs.* Bennett, the court says:

"No sufficient reason has been suggested why the contemplated use may not be for and upon the possession of a person other than the appropriator. The authorities we have seem to support that it can be and we believe it is correct upon principle. We take it, therefore, that the *bona fide* intention, which is required of the appropriator to apply the water to some useful purpose, may comprehend a use to be made through some other person and upon lands and possession other than those of the appropriator. Thus the appropriator is enabled to complete and finally establish his
103 appropriation through the agency of the user."

It is also held that such canal companies "must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as a private enterprise prosecuted for the benefit of its owners."

Wyatt *vs.* Irrigation Co., 33 Pa., 147.

Reservoir Co. *vs.* Southworth, *supra.*

Strickler *vs.* Colorado Springs, 26 Pac., 313.

Oury *vs.* Goodwin, 26 Pac., 377.

The law laid down in the cases cited above is applicable to similar litigation in this Territory, as the law of prior appropriation governs

in both jurisdictions. These corporations are deemed to be beneficial in the development of the country and the right of eminent domain is accorded them to facilitate their operations. Subsec. 6 of sec. 17, quoted above, provides that lands, stone, timber, gravel or other material, or so much thereof as may be necessary, may be condemned and appropriated by such companies, but in case of a failure to agree upon compensation for property thus taken, sec. 18 provides:

"Should any such corporation be unable to agree with the owners as to the compensation to be paid for any such land, water, timber, stone, gravel or other materials, the amount shall be ascertained and determined by the appraisal of three disinterested commissioners, who shall be appointed on application of either party, and upon five days' notice to the other party, by the judge of the district court in and for the district in which such land, water, timber, stone, gravel or other material may be situated; and said commissioners, in their assessment of compensation, shall appraise such premises or property at what would have been the value thereof, if such reservoirs, canals, ditches or pipe lines for which such premises or property shall be required, had not, or was not in contemplation of being built or constructed; and upon a return into court of such
104 appraisement, and upon the payment of the clerk thereof, or to the parties entitled to such compensation, the amount so assessed by such commissioners, the land, water, timber, stone, gravel or other materials so appropriated shall be deemed to be taken by such corporation, which shall thereby acquire full title to the same, for the uses and purposes aforesaid."

In view of these provisions of these statutes, it cannot be considered an invasion of private rights, to condemn and appropriate so much of the lands of private owners as may be necessary, by such reservoir and canal companies. Compensation for such property is deemed sufficient for the owner, but the right to the use of so much water as has been lawfully appropriated is not subject to this rule, and the appropriator is given ample protection by the provision that only surplus water may be appropriated by such companies.

Defendants contend that under sec. 25 of the act above referred to, the complainant company is prohibited from appropriating any water from the Rio Grande between the 15th day of February and the 15th day of October in each year. While I do not deem it necessary to pass upon this question for the purpose of this case, I have given the matter consideration and have arrived at the conclusion that the Rio Grande is not within the operation of that section.

The act of 1887, section 25, being section 492 of the Compiled Laws of 1897, provides in substance that no corporation organized for taking water for the purpose of irrigation or other purposes shall have any right to divert the use of the natural flow of water or any stream which by the law of 1854 had been declared a public acequia, for any use whatever, between the 15th day
105 of February and the 15th day of October of each year unless with unanimous consent of every person holding agricultural and cultivated lands under such stream or public acequia, etc.

A reference to the session acts of 1854 will show that there was no statute passed at that session of the legislature on the subject referred to. In 1852 the act of January 7th was passed, which may be found in the Compiled Laws of 1865, page 20, in full; all the material sections of this act were also compiled in 1884, beginning with section 6 of the Compiled Laws of 1884, in fact section 6 is the only material section so far as the present inquiry is concerned. This section is also carried into the compilation of 1897, as section 6. As there was no act of 1854, as referred to in the act of 1897, it is clear that this was a mistake; the act of 1852 was evidently intended. In 1854 the Davenport compilation of the statutes was made and the act of 1852 was carried into that compilation in full. See revised Code of New Mexico, page 86. This accounts for the mistake; reference was evidently had to that code instead of the session act.

A consideration of the section (6) above referred to, together with the entire act, will show that it could have no application whatever to a stream like the Rio Grande; what is meant by this section is such ditches, acequias or natural water-courses used as acequis, as have become the subject of private or community ownership, and upon which labor is expended for the purpose of appropriating the water therefrom and using the same to irrigate the lands of the persons so working thereon.

The defendants seek to defend, not only on behalf of themselves, but also on behalf of their grantors, ancestors and others "to
106 the number of many thousands," and allege that for centuries, in some instances, their grantors and ancestors had used the waters of the Rio Grande and had secured rights under the laws of Spain and Mexico, guaranteed to them by the treaty of Guadalupe Hidalgo, to the full extent of the flow of said river during the planting and growing season, etc.

As to the first of these allegations of the answer, I must decline to consider the rights of other than the defendants and those interested along the line of the proposed canal. The court cannot consider the rights of all appropriators of water from the Rio *Rio* Grande below the terminus of the proposed canal. First—because they are not parties to the suit, and therefore not subject to the orders, nor bound by the decision of this court. Second—the testimony of Mr. Harroun as to the flow of water shows that fully as much water flows in the river at San Marcial, far below Albuquerque, as flows at Albuquerque and above during most of the year, and sometimes much more, all of which tends to show that there are tributaries contributing waters to the lower part of the river that must be taken into account when the rights of appropriators below the proposed canal are determined. If the rights of appropriators below are affected by the diversion of water through the proposed canal, the courts are open for the protection of their rights. This case involves the right of eminent domain over the defendants' land, or of land-owners along the line of the canal, and as to that issue parties below the terminus of the ditch have no interest. The rights of parties to the

use of water below the canal cannot be affected by this decision and will not be considered.

107 Upon the other allegations of defendants as to treaty rights, I am of the opinion that the lands of citizens of New Mexico, since the cession, are subject to the operation of the law of eminent domain under the laws of the United States, and the States and Territories thereof, and not exempt therefrom by virtue of the treaty of Guadalupe Hidalgo. The appropriation and distribution of water must be governed by similar laws, inasmuch as the United States has adopted its own system of water rights and adjusted the system to the different sections of the country as necessity required, and the laws of the States and Territories are in harmony therewith. These laws must govern wherein they differ from the treaty provisions, and wherein they are harmonious, treaty provisions need not be considered. The laws of the United States and the States and Territories are ample for the protection of the rights of appropriators of water in this Territory, and remedies for impairment or destruction of such rights, are adequate also.

It is insisted that the complainant company does not intend to construct a reservoir, or reservoirs, for the purpose of storing surplus water, nor has it the means to do so. The statute certainly authorizes such companies to do so; the charter of this company provides for such construction; Mr. Childers, one of the incorporators, testifies that it is the intention of the company to construct reservoirs if it becomes necessary to do so; and Mr. Harroun's testimony is to the same effect, and further, that it is feasible to do so. In view of this evidence, and the fact that other evidence in the case shows that the complainants are aware that the river may not contain surplus water at all times, I cannot accept the view that com-

108 plainants do not intend to construct reservoirs for the storage of water; that they have not the means to do so is not a material matter at this time.

The fact that the headgate of the proposed canal is situated above the mouths of the other ditches is not material, as the rights of prior appropriators will be the same in any event.

It is true that the proposed canal may cross the line of one or more of the old ditches, but the construction of the canal cannot be prohibited for this reason. It is within the knowledge of this court that the ditches now existing cross each other without affecting the flow of the water. Some of the ditches in the vicinity of Albuquerque cross each other, as shown by the plat filed as evidence. Of course, the complainant company will not be allowed to destroy the present ditches or in any way diminish the flow of water lawfully diverted by or flowing through the old ditches. If, however, the canal can be constructed without injury to the present capacity of the old ditches, it may lawfully be done. The remedy that the law provides cannot be invoked until injury is attempted or threatened, but the construction of the canal alone is not necessarily an injury, as it may not affect the rights of prior appropriators in the slightest degree.

The full scope of the defense in this case is to the effect, that all

of the water of the Rio Grande had been legally appropriated before the inception of complainant's rights. The logical conclusion from this would be, that there can be no further diversion of water from this stream, no further ditches or canals constructed, and no further lands brought under cultivation. I cannot so conclude from the evidence in this case, nor from the law of the case, as I understand it.

109 I am of the opinion that the complainant company had a legal right to construct the proposed canal at the time it attempted to do so, and for that purpose they were authorized to enter upon, examine and survey so much of the lands of the defendants as were necessary for the construction of said canal. That the defendants had no right to obstruct or interfere with the agents of the complainants in the proscution of their work. That the injunction was properly granted and continued in force, and that the same ought to be made perpetual by the order of this court.

It is therefore ordered that the decree rendered by the court below, be affirmed, and that a decree be entered accordingly, and that appellee have and recover its costs expended in this behalf, to be taxed.

WILLIAM J. MILLS,
Chief Justice.

We concur:—
FRANK W. PARKER, *A. J.*
CHARLES A. LELAND, *A. J.*

Judge McFie, before whom the case was tried below, did not sit in this case.

110 TERRITORY OF NEW MEXICO, } ss:
Supreme Court, }

I, Jose D. Sena, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing 109 pages contain a full, true and perfect copy of the record and proceedings, pleadings and opinion filed in the above-entitled cause which is transmitted to the Supreme Court of the United States, in accordance with an appeal hereinbefore granted herein.

Witness my hand and the seal of the supreme court of the Territory of New Mexico, this the 6th day of June, A. D., 1900.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

111 In the Supreme Court of the United States, October Term, A. D. 1900.

TOMAS C. GUTIERRES, PEDRO GRIEGO Y APODACA, JESUS ZAMORA, Ben.to Jaramillo, and Leon Montoya, Appellants,
vs.
ALBUQUERQUE LAND & IRRIGATION COMPANY, Appellee.

Assignment of Errors.

Come now the said appellants, and show to the court here that in the record, proceedings and judgment of the supreme court of the Territory of New Mexico in the above-entitled cause there is manifest error to the prejudice of these appellants, in this, to wit:

I.

The court erred in affirming the judgment of the district court of Santa Fé county because the facts found by the said district court are insufficient to support the said judgment.

II.

The court erred in affirming the conclusion of law of the said district court, as follows:

"That the plaintiff, by the filing of its articles of incorporation with the secretary of the Territory of New Mexico and complying with the provisions of the act under which it is inforporated, has acquired a right to construct its canal and reservoirs to divert through its proposed canal surplus and unappropriated waters flowing in the Rio Grande and that such right of eminent domain does not depend upon the ownership of lands by plaintiff or the employment of plaintiff prior to the construction of its canal by owners of lands to carry water for such owners."

III.

The court erred in refusing to hold that the act under which the appellee is incorporated as construed by the district court of Santa Fé county, is in contravention of the legislation of Congress
112 on the same subject, especially the act of March 3rd, 1877, entitled "An act to provide for the sale of desert land in certain States and Territories," and the acts of Congress amendatory thereof.

IV.

The court erred in affirming the conclusion of law of the said district court as follows:

"That the defendants, at the time of the filing of the complaint herein, unlawfully obstructed the plaintiff in the exercise of powers lawfully conferred upon it by the act under which it is incorporated."

V.

The court erred in affirming the conclusion of law of the said district court as follows:

"That the defendants do not and cannot in this action lawfully represent the rights of such persons claiming a right to the use of the waters of the Rio Grande, by prior appropriation, when the appropriation of such persons was effected at a point below the mouth of the proposed canal of plaintiff."

VI.

The court erred in affirming the conclusion of law of the said district court as follows:

"That the defendants cannot lawfully set up in this action any rights secured to them and their associates or their predecessors in title by the treaty of Guadalupe Hidalgo and that the allegations of paragraph ten of the answer of defendants with reference to the treaty rights of defendants are immaterial."

VII.

The court erred in affirming the judgment of the district court of Santa Fé county refusing to grant to appellants the relief demanded in their cross-complaint.

Wherefore the said appellants pray that the said record may be seen and examined by this honorable court; that the errors of the said supreme court of the Territory of New Mexico and of the
113 said district court of Santa Fé county in said Territory of New Mexico may be corrected; that the judgment of the said supreme court of the Territory of New Mexico may be annulled and that these appellants may be restored to all things which they have lost by reason thereof.

NEILL B. FIELD,
Attorney for Appellants.

[Endorsed:] No. — Territory of New Mexico. United States Supreme Court. Tomas C. Gutierres, *et als.*, *vs.* Albuquerque Land and Irrigation Company. Assignment of errors. Neill B. Field, Albuquerque, N. M., attorney for appellants.

Endorsed on cover: File No. 17,802. New Mexico Territory supreme court. Term No. 85. Tomas C. Gutierres, *et al.*, appellants, *vs.* The Albuquerque Land and Irrigation Company. Filed June 16th, 1900.